Olympia Plastics Corp. *and* Rubberized Novelty & Plastic Fabric Workers' Union, Local 98, International Ladies' Garment Workers' Union, AFL-CIO. Cases 29-CA-8439-2, 29-CA-8581, 29-CA-8619, 29-CA-8949, and 29-RC-5205[1]

March 22, 1983

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 9, 1982, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] recommendations, and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Olympia Plastics Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(c):

"(c) Make whole employee Gifford Sterling for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Make whole employees Michael Thompson, Daniel Ellis, Israel Arroyo, and Edwin Powell for any losses of pay they may have suffered by reason of the discrimination against them in the manner set forth in *Ogle Protection Service, Inc., and James L. Ogle, an Individual*, 183 NLRB 682 (1970). Interest on the backpay to all discriminatees shall be as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)."

IT IS FURTHER ORDERED that the complaint in Case 29-CA-8949 be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the challenge to the ballot of Issac Hersko in Case 29-RC-5205 be, and it hereby is, sustained.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Rubberized Novelty & Plastic Fabric Workers' Union, Local 98, International Ladies' Garment Workers' Union, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All full time and regular part time production and maintenance employees, including shipping and receiving employees employed by the Employer, excluding all office clerical employees, guards and supervisors as defined in the Act.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges filed by Rubberized Novelty & Plastic Fabric Workers' Union, Local 98, International Ladies' Garment Workers' Union, AFL-CIO, herein called Petitioner, Charging Party, or Local 98, the Regional Director for Region 29, herein called the Regional Director, on January 8, 1981,[1] issued a complaint and notice of hearing in Case 29-CA-8439-2, alleging in substance that Olympia Plastics Corp., herein called Respondent or the

[1] Amalgamated Union, Local 5 was permitted to intervene in this proceeding.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In adopting the Administrative Law Judge's finding that Respondent's no-solicitation rule was overly broad, Member Hunter relies on his concurring and dissenting opinion in *Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc.*, 262 NLRB 1407 (1982).

[4] In his recommended Order, the Administrative Law Judge provided that the backpay due employee Sterling because of his unlawful discharge, and the backpay due employees Thompson, Ellis, Arroyo, and Powell because of Respondent's unlawful change of its lunch break procedures and reduction of work and overtime, were to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950). We shall modify the Administrative Law Judge's Order so as to apply the *F. W. Woolworth* formula in computing Sterling's backpay and to apply *Ogle Protection Service, Inc., and James L. Ogle, an Individual*, 183 NLRB 682 (1970), in computing the backpay due the other discriminatees. Interest for all the discriminatees shall be as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

[1] All dates hereinafter referred are in 1981 unless otherwise indicated.

Employer, violated Section 8(a)(1) and (3) of the Act by giving the impression of, and keeping under surveillance the activities of, its employees on behalf of Local 98, threatening its employees with discharge because of their activities on behalf of Local 98, informing its employees that it would be futile for them to select Local 98 as their bargaining representative, and by laying off and failing to reinstate its employee Gifford Sterling because said employee joined and assisted Local 98.

On January 30, the Regional Director issued a Report on Challenged Ballots and an order consolidating cases and notice of hearing, consolidating for hearing Case 29-CA-8439-2 with Case 29-RC-5205, which involves determinative challenges on the supervisory status of Isaac Hersko and Frank Magnotta, with respect to an election conducted involving Local 98, the Employer, and Amalgamated Union, Local 5, herein called Local 5 or the Intervenor.

On March 31, the Regional Director issued an order consolidating cases and complaint and notice of hearing in Cases 29-CA-8581 and 29-CA-8619, alleging that Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge if they became or remained members of Local 98, informing its employees that it would be futile to select Local 98, and offering and promising its employees wage increases and vacations to induce them to refrain from supporting Local 98.

The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by harassing its employees by forbidding its employees to take their coffee-breaks in the place where they had previously been permitted to take such breaks, by denying Israel Arroyo a pay increase, bonus, and other benefits, and by providing employees with less employment than they previously had received because said employees joined and assisted Local 98.

On April 23 the Regional Director consolidated Cases 29-RC-5205, 29-CA-8439-2, 29-CA-8581, and 29-CA-8619.

A hearing was held before me in Brooklyn, New York, with respect to the above-entitled cases on May 4, 6, 7, and 8. At the opening of the hearing, I permitted the General Counsel to amend the complaint to allege that Respondent violated Section 8(a)(1) and (2) of the Act by urging its employees to vote for Local 5 rather than Local 98 in the January 9, 1981, election. Additionally, the General Counsel amended the complaint to allege that the harassment and closer supervision of employees alleged to be violative of Section 8(a)(3) of the Act also were in reprisal for testimony and charges filed under the Act and in violation of Section 8(a)(4) of the Act as well.

On July 29 the Regional Director issued a complaint and notice of hearing in Case 29-CA-8949, alleging that Respondent violated Section 8(a)(1), (3), and (4) of the Act by issuing a warning to its employee Israel Arroyo, imposing more arduous working conditions upon its employees, and discharging its employees Daniel Ellis and Edwin Powell, because they had joined and assisted the Union and had appeared and given testimony in Cases 29-RC-5205, 29-CA-8439-2, 29-CA-8581, and 29-CA-8619.

Subsequently, pursuant to a motion filed by the General Counsel, I issued an Order on September 11 reopening the hearing on the prior cases and consolidated said cases for hearing with Case 29-CA-8949.

The reopened hearing was heard before me in New York, New York, on October 26, 27, 28, and 29. During the course of the reopened hearing, the General Counsel further amended the complaint to allege that Respondent violated Section 8(a)(1) and (4) of the Act by attempting to condition the reemployment of Arroyo upon Arroyo's recanting his testimony that he had previously given, and testimony that he had furnished to the NLRB in various affidavits.

A brief has been received from Respondent. Counsel for the General Counsel submitted a letter in lieu of a formal brief.

Upon careful consideration of the entire record, the brief, and letter submitted by the parties, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation, with its principal place of business located in Brooklyn, New York, where it is engaged in the manufacture, sale, and distribution of plastic bags and related products. During the past year, Respondent manufactured, sold, and distributed at its plant, products valued in excess of $50,000 directly to firms located in States outside the State of New York. It is admitted and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is further admitted and I also find that Local 5 and Local 98 are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS—CASES 29-RC-5205, 29-CA-8439-2, 29-CA-8581, AND 29-CA-8619

A. *Organizational Activity at Respondent*

Respondent is a closely held corporation, wholly owned by Henry Herbst, its president, and his wife who are its sole officers and directors. It began operations in 1972, and was incorporated in 1976.

On January 6, 1976, Respondent entered into a collective-bargaining agreement with Local 5 encompassing a bargaining unit consisting of all of its employees, excluding supervisors, clericals, and guards. The contract's expiration date was January 5, 1979, and it contained a union-security clause, clauses providing for vacations, holidays, wages, welfare payments, checkoff arbitration, and paid sick leave. On January 9, 1979, the parties executed a one-page document, amending the prior agreement to retain all the terms included thereof, and providing for raises in wages and welfare fund contributions, and extending the expiration date to January 5, 1982.

The record reflects that the above contract for all practical purposes was not enforced with respect to Respondent's employees. Thus, employees Gifford Sterling,

Edwin Powell, Daniel Ellis, Michael Thompson, and Israel Arroyo, who were hired on various dates between 1976 and 1979, were never members of Local 5, were not told about Local 5 when they were hired, and heard nothing about Local 5 until the fall of 1980, after Local 98 began to organize Respondent's employees.[2]

In addition, the record discloses that Local 5 never filed or processed any grievances and did not have a shop steward at Respondent's premises. Herbst admitted in his affidavit and the record confirms that he had never gone by the contract with respect to wages and that he unilaterally determines the wages of his employees, and when and to whom wage increases should be granted. Additionally, the record discloses that employees were not paid for sick days as per the contract.

In late 1980, Carlos Quinon, an official of Local 5, informed Herbst that employees were not receiving sick pay under the contract. Herbst replied that the employees who were not receiving sick pay were not in the Union. Quinon replied that the employees were entitled to the sick pay and the conversation concluded.[3]

In July 1980, Magdalena Jean Pierre, an organizer for Local 98, met with some of Respondent's employees, a block and a half away from the plant. She ascertained from them that, insofar as they were aware, there was no union then representing these employees, and obtained authorization cards from these workers. The employees were Thompson, Sterling, Ellis,[4] Powell, and Otis Hudson.

A few weeks after these cards were signed, Thompson was confronted by Frank Magnotta on the job. Magnotta said to Thompson that he had heard that the men were trying to get a union in the Company, but it would not work. Thompson did not reply and the conversation ended.[5]

Over the next several months, Jean Pierre met with employees from time to time, always away from the plant. During this period of time, the employees would talk about the Union during lunch hour, but no supervisors or alleged supervisors were present during any of these discussions. In fact, the employees made it a point not to discuss the Union whenever Hersko or Magnotta were around.

Because of internal union vacation scheduling, Local 98 made no attempt to contact Respondent until October 1980. On October 26, Respondent received a letter dated October 24 from Local 98, claiming that it represents a majority of Respondent's employees, and requesting recognition and bargaining. The record discloses no reply by Respondent to this letter.

On October 30, 1980, Local 98 filed a petition in Case 29-RC-5205 seeking to represent Respondent's employees. The record does not disclose the date that the petition was received by Respondent.

Local 98 scheduled a meeting of Respondent's employees for the evening of November 6, 1980, at MacDonald's restaurant, which is located half a mile away from the plant. The employees had discussed the holding of this meeting at the plant prior to its being held but again did not discuss the subject when Hersko, Herbst, or Magnotta were present or in the area.

About 6 p.m; Powell and Thompson left the plant together. As they were leaving they noticed a car parked across the street from the plant, about 50 feet away. Inside this car, which was unmarked, sat Jean Pierre, the Local 98 organizer. They also observed Hersko and Magnotta standing outside the plant at the foot of the door looking towards Jean Pierre's car. Accordingly, Thompson and Powell walked in the other direction to go to the meeting. Sterling came out of the plant a few minutes later and walked directly to Jean Pierre's car, got in, and they drove to the meeting.[6]

Hersko and Magnotta observed Sterling walk over to the car, get in, and drive away. This incident was the first time that Jean Pierre was present outside Respondent's plant, and the record discloses no evidence that Hersko or Magnotta had ever seen her before, or were aware that she was a representative of Local 98 or any labor organization.

Powell, Thompson, and Sterling met with Jean Pierre and Local 98's attorney at the MacDonald's restaurant that evening.

The next morning, at 9:30 a.m., Respondent received a telegram from Local 98. The telegram advised that the following employees have signed authorization cards for Local 98 designating the Union as their collective-bargaining representative. The employees named were Powell, Sterling, Ellis, Thompson, and Otis Hudson.[7] The telegram goes on to say that it is a violation of Federal law to discriminate against employees because of their union activity and that any violations of Federal labor law will immediately be brought to the attention of the National Labor Relations Board.

B. *The Layoff of Gifford Sterling*

As noted above, at 9:30 a.m. on November 7, 1980, Respondent received a telegram from Local 98 indicating that five employees including Sterling had signed authorization cards for that Union.

At the end of the workday on November 7, Hersko called Sterling into Hersko's office and informed him that work was slow and that he was laid off. Hersko instructed Sterling to call the next Wednesday to see if anything turned up, but that he should not be disappointed if nothing turned up. The next Wednesday, November 12, Sterling went to the plant and asked Hersko if work

[2] In the fall of 1980, Respondent also employed Benny Weiler, who worked in the bag making department with these five workers. Respondent also employed Texas Clamp who worked in the printing department with Frank Magnotta. Although Weiler and Clamp, both clearly members of the bargaining unit, testified on behalf of Respondent, they gave no testimony on the subject of whether they were members of or were aware of Local 5. Respondent also employed Magnotta and Isaac Hersko, both alleged by the General Counsel to be supervisors within the meaning of the Act, and whose supervisory status will be discussed in detail *infra*. Both Magnotta and Hersko testified to being members of Local 5, and in fact insofar as this record discloses were the only Local 5 members employed by Respondent in the fall of 1980.

[3] The above finding is derived from Herbst's affidavit.

[4] Ellis was also known as Lester Macalman.

[5] As noted, Magnotta's supervisory status will be discussed in detail *infra*.

[6] Sterling had previously arranged with Jean Pierre to be picked up by her to drive to the meeting.

[7] In fact, Hudson had been terminated on or about mid-July 1980.

had picked up. Hersko replied that, "things do not work out yet," and instructed Sterling to call the next week. The next week Sterling visited the plant again. Hersko asked him why he did not call, and Sterling replied that he was in the area so he came in. Again Hersko told him things did not work out.

A week later, Sterling called on the phone and again spoke to Hersko. Hersko this time replied that things were still slow and that Sterling was "permanently laid off for the time being as there looked to be no improvement in the near future in work." He also suggested that if Sterling could find himself something else he should do it.

Herbst testified that the first knowledge he had about any union activities at the plant came when he received the letter from Local 98 on October 26. Herbst testified that at that time he did not know who had signed cards, but that he had an idea. Initially when asked, Herbst responded that he did not suspect that Sterling had signed a card. He went on to say, "Well, I suspected certain employees. But Gifford Sterling would be the last one I would suspect that he would be any ringleader or anyone who would instigate the whole idea."

When asked if he was shocked when he saw Sterling's name on the telegram of November 7 as a union signer, Herbst testified, "I wasn't shocked because I knew that he would be part of the clan . . . ."

Herbst did not explain what he meant by the expression, "part of the clan," but, upon further interrogation, his meaning became apparent. Thus, when asked again about which employees he suspected of involvement with Local 98, he responded Powell, Sterling, and the rest of the witnesses who had testified at the instant hearing on behalf of the General Counsel.[8] When asked for the basis of his feelings, he answered that he could not believe that any others would be dissatisfied with conditions at the plant, and that he believed that these employees thought Respondent practiced some sort of discrimination in its dealings with employees.

I would note in this connection that Thompson, Powell, Ellis, and Sterling are black and Arroyo is Puerto Rican. The remaining employees and alleged supervisors of Respondent were white. Herbst further testified that there developed "a certain hatred amongst the employees." It is thus clear and I so find that Herbst associated the support for Local 98 with the black and Puerto Rican employees employed by Respondent in its bagmaking department.

This conclusion is further reinforced by the testimony of Arroyo, Herbst, and Hersko, concerning remarks allegedly made by Herbst to Hersko, and overheard by Arroyo. Arroyo testified that shortly after the election in January 1981, while he was standing at his machine, he overheard Herbst tell Hersko that the Union was causing problems, and the best thing from now on would be to hire only Jews, that Jews would not bring this kind of problem. (Herbst and Hersko are both Jewish.) Herbst and Hersko deny that such a comment was made, and, although I was not impressed with their credibility in a number of areas of their testimony, to be detailed more fully *infra*, in this instance I credit their denials, and find that no such statement was made. I note that Arroyo testified that the remark was made in English, while admitting that Herbst and Hersko often speak in Yiddish when talking to themselves. Arroyo then testified rather ludicrously that they do not speak Yiddish much around Arroyo, because he understands a few words. Thus, Arroyo would have us believe that Herbst made this obviously damaging remark in English, where Arroyo could clearly understand, since his English is much better than his understanding of a few Yiddish words. Moreover, Arroyo testified that Powell was standing right next to him at the time, and must have overheard the comment. However, Powell, who testified as the General Counsel's witness, did not corroborate Arroyo's testimony as to this very significant statement. Additionally, in his pre-trial affidavit, Arroyo claimed that this comment was made to Hersko "in front of everyone." Yet no one else testified to hearing such a remark being made. Accordingly, I conclude that Herbst did not make such a statement, but that Arroyo's testimony on this issue was reflective of his and perhaps other employees' perception that Respondent discriminates on racial or religious grounds. Although this record does not support such a conclusion, and I make no finding in this regard, I do find as noted above that Herbst being aware of such a perception among some of his employees, believed, correctly as it turned out, that his black and Puerto Rican employees formed the nucleus of Local 98's support in the shop. I also find, based on Herbst's own vacillating testimony, that, although he did suspect the possible involvement of Sterling with Local 98, he was uncertain as to Sterling's role. I believe that he was somewhat hopeful that Sterling was not in fact a Local 98 supporter and that he was disappointed and somewhat surprised to learn on November 7, when he received the telegram from the Union, that Sterling had in fact been a Local 98 card signer.

Sterling was hired in March 1979 as a packer. At that time, Respondent's business was substantially devoted to importing plastic bags and repacking the bags into smaller packages for sale to its customers. Thus, most of its employees at this time were classified as packers, including Sterling. During 1979, the packing operations dwindled, and Respondent laid off all of the employees classified as packers, with the exception of Sterling.

As of 1980, Respondent was engaged almost exclusively in manufacturing operations. Sterling, who Respondent felt had been the best worker among the packers, was retained to perform the small amount of packing work available and to become a permanent floorboy or helper. His job functions included cleaning up the shop and the office, taking out the garbage, running errands, sorting boxes, making sure the boxes near the machines are in line, helping the machine operators by bringing them boxes, when necessary, helping Hersko in shipping and receiving, and assisting in the printing department when called upon. In the printing department he would help Clamp and Magnotta cleaning up the presses, wash out pans, and help lift the heavy rolls onto the machines.

[8] This would include Ellis, Thompson, and Arroyo as well.

Respondent tried Sterling in early 1980 as a machine operator on the more complicated machines, but found him to be incapable of operating them properly. Sterling would be assigned to operate the less complicated #10 machine on the average of 5–10 hours per week, and would occasionally in emergency situations be assigned to take bags on and off other machines which had been set up by Hersko.

Respondent claims through its witnesses, Herbst and Hersko, that there was simply insufficient work available to justify Sterling's retention on or after November 7. Herbst testified that Hersko informed him on or about November 3, 1980, that there was not enough work available for Sterling to perform. Herbst allegedly replied that he would wait and see what was going to happen. Herbst then allegedly considered the matter during that week, and instructed Hersko to inform Sterling that he was to be laid off at the end of the day on November 7.

Hersko testified that work got quieter and quieter during the last couple of weeks before Sterling's layoff, and that "Mr. Herbst for some reason did not want to lay him off. He told me let him help you out, you know, shipping receiving, wherever you need him, he'll help out." He testified further that 2–3 weeks before the layoff things were busy in shipping and receiving and there was work for Sterling but then he went back to becoming a floorboy. Hersko denies suggesting to Herbst that there was not enough work available for Sterling to perform. Rather he recalls that Herbst asked him if there was work available in shipping and receiving for Sterling and he said no. He denies discussing with Herbst the general availability of work for Sterling.

Respondent also adduced testimony that in June and July 1980 they were operating eight to nine machines while in November, they were down to operating five or six machines. This evidence, according to Respondent, corroborates the testimony of Herbst as to the lack of available work for Sterling. Respondent produced no records or other documentary evidence relative to this subject. In addition, no testimony was adduced as to what was different about November 7 as opposed to any other dates between then and June and July when there were more machines in operation.

In fact the only records introduced into the record were production and payroll records of Respondent submitted by the General Counsel. The payroll records show that, despite the alleged difference in the amount of machines in operation, Respondent's complement of employees from March 12, 1980, to the date of Sterling's layoff remained the same.[9]

The General Counsel computed the number of machine days per week by using Respondent's weekly production records and the hours worked chart. These calculations are set forth below:

Week Ending	Machine Days[1]	Sun. Machine Days
1980		
3/23	25	4
3/29	36	6
4/7	13	0
4/14	21	5
4/21	33	2
4/28	25	0
5/5	30	2
5/12	31	4
5/19	33	6
5/26	16	3
6/2	32	2
6/9	29	1
6/16	31	2
6/23	30	2
6/30	33	4
7/7	27	1
7/14	30	1
7/21	28	1
7/28	29	1
8/4	22	1
8/11	26	1
8/18	19	0
8/25	20	1
9/1	-	-
9/8	27	1
9/15	-	-
9/22	26	0
9/29	-	-
10/5	-	-
10/13	29	1
10/20	26	1
10/27	26	1
11/3	27	2
11/10[2]	23	2
11/17	23	2
11/24	27	4
12/1	34	5
1981		
2/9	38	1
2/16	29	1
2/23	32	1
3/2	35	1
3/9	30	1
3/16	33	0
3/23	31	0
3/30	35	1
4/6	36	2
4/13	35	2

[1] A machine day is the operation of a machine on a given day.
[2] Sterling was laid off on November 7, 1980.

This computation tends to show that Respondent's production requirements were essentially the same before and after the termination of Sterling. Although these records are far from conclusive as to the amount of work available in general and for Sterling in particular, they are in my judgment somewhat probative of these issues, particularly in the absence of any records to the contrary submitted by Respondent.

[9] Thus, the records show seven employees plus Magnotta and Hersko, and a brief period in September 1980 when Morris Magnotta, Frank's son, was employed as a favor to his father.

The record reveals that no employee was hired subsequent to the layoff of Sterling who performed the exact work that Sterling was responsible for. However, the record establishes that all of the tasks previously performed by Sterling were still needed after his layoff and were performed by other workers. Thus, each employee would be required to sweep up near his own machine and Michael Thompson swept up the rest of the plant and took out the garbarge. It was estimated by employee Texas Clamp, Respondent's own witness, that Sterling previous to his layoff had spent most of the mornings cleaning up and taking out the garbage.

In the printing department, Clamp performed the cleanup work and washing out the pans that Sterling had previously performed. When it was necessary to change the rollers on the press, which required additional help, Magnotta would ask Thompson or Powell to assist them in this regard and they would do so.

On January 14, 1981, Respondent hired David Azarev. Azarev was a full-time machine operator, and he operated machines different from #10 machine operated by Sterling. However, Azarev also assisted Thompson in cleaning up the shop, spending 1-1/2 hours per day performing these functions.

Respondent's payroll records list an employee named Fayvel as having been employed the weeks ending March 18 and 25, 1981. According to Herbst, this employee worked in shipping and receiving, but there is no testimony in the record as to what work he actually performed during these weeks.

On February 18, 1981, Respondent hired Tony Balsamo to work in the printing department as a helper. When Balsamo was hired he performed many of the same functions previously done by Sterling and by Clamp after Sterling was laid off. Thus, Balsamo would help change and move the presses, clean the trays, pans, and the plastic, and other generally unskilled and menial tasks in the printing department, which Sterling used to perform.

Herbst admits that he gave no thought or consideration to recalling Sterling before hiring any of the abovementioned employees.

C. *The Election Campaign*

As noted above, Local 98 filed a petition in Case 29-RC-5205 on October 30, 1980. On December 10, 1980, Local 98, Local 5, and Respondent executed a Stipulation for Certification Upon Consent Election to be held on January 9, 1981, in a unit of all full-time and regular part-time production and maintenance employees, including shipping and receiving employees employed by Respondent, excluding office clerical employees, guards and supervisors as defined in the Act. The election was held as scheduled, with the results showing four votes for Local 98, two votes for Local 5, and two challenges, the ballots of Magnotta and Hersko, challenged by Local 98 as supervisors, which were determinitive of the election results.

During the period between November 1980 and January 1981, Hersko and/or Herbst had a number of conversations and discussions with employees concerning unions and the election. These conversations are detailed below and are based on the credited testimony of the various employee witnesses, which were frequently not denied by Herbst or Hersko. Where there have been denials, I find the employees testimony to be more believable, particularly in view of the similarity of the statements made to the undenied remarks made by Hersko and Herbst.

Sometime in November 1980, Hersko informed all the employees to come into his office from 10 to 6. Herbst informed the employees that he was aware of the fact that the Union was trying to get into the shop and that there were union activities in the shop. He then announced that he did not want anyone speaking about the Union in the plant during working hours, and added that anyone found talking about the Union during this time would be fired. Thompson asked what happens after working hours, and Herbst replied "that's your time."

On a date in late November 1980, a representation case hearing was scheduled to be held at the NLRB Regional office. Thompson was scheduled to be a witness for Local 98 at the hearing. He did not notify Respondent the night before that he would not be at work, but he called at 8 a.m. and informed Magnotta that he was not going to be in that day. As it turned out the hearing had been postponed, so Thompson reported to work around 11 a.m. He was confronted by Hersko when he arrived at work, and Hersko told him that if he were not coming into work he should tell Hersko the night before and tell him what Thompson was going to do. Thompson replied that what he (Thompson) was going to do was his own personal business. Hersko responded that, if Thompson had checked with him the evening before, he would have informed Thompson that the hearing was postponed. Thompson answered that he was not supposed to talk to Hersko about that.

On or about December 9, 1980, Thompson informed Hersko that he would not be in the next day which was to be the postponed date of the hearing. Hersko wished Thompson good luck and added that he had already checked it, and "nothing is going to come of it." Thompson replied, "anything I started I was going to finish." Hersko said, "Okay."

Thompson went to the Regional Office for the hearing and returned to work later that day.[10]

Thompson testified that, after he came back from the representation case hearing, Hersko would come to his machine more frequently than usual, and would look at him, pull out bags, measure them, and test the seals. Thompson could not recall how many times a day Hersko came to his machine, other than to testify, "since this thing started he's there more." Thompson also did not testify how often Hersko came to his machine before the hearing, nor how long after the hearing Hersko continued to be at his machine "more than usual."

Shortly before the January 9, 1981, election, a number of conversations occurred between Hersko and employees concerning the Union and the election. Although

[10] The record does not reveal whether or not any hearing commenced or any testimony was taken. As noted, a Stipulation for Certification was executed by the parties and approved by the Director on December 10, 1980.

Powell was uncertain whether his undenied conversation took place before or after the election, I find from the context of the discussion that it must have, and in fact did, occur shortly before the election.

Hersko called Powell into Hersko's office, and told him that union activity was going on and it will not work. Powell replied that the employees have to get something to benefit themselves. Hersko then asked why he did not come to Hersko and discuss it. Powell responded that, "we are here so long and there's nothing, so we have to go on our own and try to find something for ourselves."

Hersko replied that if the employees have problems they are supposed to come to him and he would discuss it with Herbst and make arrangements for things to work out right. Hersko added that he was not trying to bribe the employees, but they should think it over, because if they went against him he would lose all his authority and could do no more.

Powell responded that he should have said that before, but at this stage he did not intend to change and that the employees were going together and, win or lose, he was going ahead with what he intended to do. At that point the conversation began to degenerate into racial insults with Hersko stating that, "We are all equal," and Powell replying, "We are not equal, you are a Jew and I am black." Hersko then remarked that the conversation was becoming racist and walked out of the office.

On the day before the election, Hersko approached Ellis at 5:50 and told him to shut off his machine and come into Hersko's office for "a friendly talk." Ellis complied and went into Hersko's office where no one else was present. Hersko announced that the next day there would be an election between Local 5 and Local 98. He added, "I didn't know who is bringing in Local 98, but Local 5 is our union." He continued, "now I know that we are good friends and I know you're not going to let me down, so I'm deliberately telling you to vote for Local 5."

Hersko also said that Ellis was due for a raise of pay, but if Local 98 got in, it would make Hersko lose his bargaining power. He continued by stating that, if Ellis voted for Local 5, he would get the same benefits as if he voted for Local 98. Hersko expanded upon that remark by commenting, "if Local 98 comes in there is going to be a fight, and if Local 5 wins it will be alright. If Local 98 comes in the shop, whatever they would be asking for would have to come from the boss and the boss wasn't going to give it."

Ellis then informed Hersko that he would vote for Local 5, and Hersko instructed him to tell everybody what he (Hersko) had said. At some point during the conversation, Herbst opened the door and said a few words to Hersko in Yiddish and then closed the door.

Also on the day before the election, Thompson told Hersko that he was not feeling well and wanted to go home early. Hersko put his hand on Thompson's forehead and said okay, but asked him to finish the roll he was working on and before he left to go to Hersko's office. Thompson agreed and shortly thereafter went to Hersko's office. Hersko closed the door and told Thompson that there would be an election the next day and asked if he had considered what he was going to do. Thompson answered yes. Hersko responded that Local 98 could do anything for him that Local 5 could do. Thompson asked what Local 5 was he talking about, and added that he did not trust that Union because they were robbers and thieves. Thompson commented that only since the employees "started to get this other union, did they hear about Local 5." Hersko answered that it was not his fault, Thompson asked whose fault was it, and Hersko answered the Union (Local 5).

Thompson then asked Hersko if he were trying to change Thompson's mind from Local 98. Hersko answered, "if you want to put it so." Thompson responded that it was his vote and no one made his mind up for him, and Local 98 would get it. He added that he would rather have any union except for Local 5.

Sometime during the week prior to the election, Hersko gave Arroyo a ride home. While driving in Hersko's car, Hersko asked, "how do you like the coming election?" Arroyo replied that he did not like it a bit, because is is better not to have any union at all, because it is two unions fighting. Hersko said "Well it is better for Local 5 to win because that way we don't get no problems, and besides the place is so small and we are a couple of people and we have been working in there for so many years we are just like one little family." Arroyo replied "we will see what is going to be." Hersko then added that if Local 5 wins there is a possibility of a bonus for Arroyo. Arroyo then stated that perhaps he might vote for Local 5.[11]

D. *Postelection Events*

On the same day of the election, after the results were announced, Hersko and Magnotta told Arroyo to wait in the paint room. Magnotta and Hersko came in and Magnotta stated that, "somebody must have made a mistake." Arroyo replied that he did not make any mistakes. Hersko then said to Arroyo, "Israel, do you realize what you have done?" Arroyo then admitted that he was confused and he did not mean to vote for Local 98, but he made a mistake because he had signed a card for Local 98. Arroyo then was sent back to his machine.

On the next working day after the election, Arroyo asked Hersko what was going to be with the Union, who won? Hersko replied, "well Israel, it's all up to the court."[12]

Arroyo then asked if there was any chances for him to get his bonus. Hersko replied, "Israel, right now I cannot help you because I have lost all my titles.[13] I used to be

[11] The record also reveals that in early December 1980 Arroyo and Hersko discussed a raise. Hersko said that he was working on a raise for everyone. He told Arroyo that he should try to come in every day so that he could get the raise, which was to be about 25 cents an hour. (Arroyo had previously been warned on many occasions to improve his poor absence record.) Neither the Union nor the election were mentioned during this conversation. Right after the discussion, Arroyo was out for 10 days in a row. When he came back he testified that he found out that everyone else had been given a 25-cent raise except for him, and that he was informed that the reason was his poor absence record. Arroyo eventually received a raise of 25 cents per hour on March 31, 1981.

[12] As noted above, the results were four votes for Local 98, two for Local 5, and two determinative challenges.

[13] As noted above, one of the two determinative challenges was Hersko's ballot, on the grounds that he was a supervisor.

like a captain in this place, but since all this union came in and we have problems all the time, I've lost all my titles. I can do nothing for you." He added that Arroyo should go "to his representative." Arroyo did not receive any bonus nor did any other employee, insofar as the record discloses.

On January 12, 1981, the first working day after the election, Respondent instituted a change in hours and a change in the lunch hour procedure for employees in the bagmaking department. Prior to the election the employees had worked from 8 a.m. to 6 p.m., Monday through Thursday, and from 8 a.m. to 2 p.m. on Friday.[14] After the election, the bagmaking employees worked from 8 a.m. to 4 p.m., Monday through Thursday, and continued to work 8 a.m. to 2 p.m. on Fridays. Additionally, the employees in this department prior to the election had been permitted to eat their lunch between 12:30 and 1 p.m. while continuing to operate their machines, and would be paid for this half hour. After the election the employees were told that they must take the half-hour lunch at the prescribed time, without working, and no longer be paid for this time.

Hersko informed the employees of these changes. He told Powell that the reason was that work was slow. He gave no reason to Ellis, but informed him that the hours and lunch procedures would be changed until he "knows what is what." Hersko did not explain what he meant by "what is what." Hersko informed Thompson of the changes, gave no reason for the decision, and did not make any further comments pertaining to the action.

The printing department continued to operate with the same hours of 8 a.m. to 6 p.m. The record did not establish what procedures were in effect either prior to or after the election with respect to lunch hours in the printing department.

Additionally, Respondent admits that, at the same time, it decided to reduce Sunday overtime for the bagmaking employees. During the same week that Respondent instituted these changes, it hired another employee for the bagmaking department.

Herbst testified that he made the decision to make these reductions in hours and overtime. Initially he testified that he made the decision in November 1980, but after being confronted with his affidavit, changed such testimony to indicate that it was in January 1981. Herbst contended that all of these decisions were motivated by the fact that there was not enough work to justify these prior hours and the Sunday overtime work. He admitted that whatever overtime work was to be assigned in the department would be and was given to Benny Weiler.[15] The reason for this exception was, according to Herbst, because Weiler had the most seniority.

The printing department continued to be assigned Sunday overtime, as well as continuing to work from 8 to 6, Monday to Thursday. In late March, Respondent increased the hours of the bagmaking department from 8 a.m. to 5 p.m., Monday through Thursday, while continuing to require them to take their lunch hour without pay.

Herbst testified with respect to lack of work available that the plastics industry in general and his firm in particular had tailed off drastically by late December 1980. Additionally, he testified that there were five-six machines in operation in January 1981. No records or other documents were introduced by Respondent to substantiate either the loss of business of Respondent or in the industry in general.[16]

Herbst explained his decision to change the employees lunch hour as follows:

> Yes, let me say this.
>
> Every employee worked lunch hour and ate while they were working.
>
> You have to understand that work done while you eat is not the work that you do while you don't eat.
>
> The people selected it that way, they wanted to work because I guess if they can read a paper they can eat their sandwich as well. They worked through the lunch hour and they were paid for their lunch hour.
>
> Came a time that I needed to work out hours for the employees because there was not enough work.
>
> Instead of dismissing the employees everyday, three or three thirty, I made that hour lunch instead of eating while you work, let them eat and not work. And go home four o'clock instead of three thirty because there was not enough work, at that particular time.
>
> Besides it is unheard of in any place of employment for an employee to work while eating.
>
> It was me that decided because I wanted to help them they should make money, going down the line every employee asked for it and I was stupid enough to do it and an employee while he is working should not eat lunch.
>
> Obviously aside from eating lunch the man rests a half an hour the work is doing after lunch is different then when he does it continuously.

Herbst testified further as to why he decided to hire a new employee, Azarev, at the same time that he was reducing hours and overtime for the department. Herbst contended that the week before the reductions he converted machine number #8 from a bottom seal machine to a saddle bag or side seal machine, which created a new machine where he could utilize another employee. Herbst admitted, however, that Powell, Thompson, and Weiler, and other employees in the department, were ca-

[14] On occasion in the summer months the employees would work until 3 p.m. on Fridays.

[15] This includes an occasional Sunday and whatever extra hours during the week that would be necessary.

[16] Production records for the period of time between December 1, 1980, and February 2, 1981, were not produced although subpenaed by the General Counsel, with Respondent claiming that they do not exist. Production records were introduced by the General Counsel for the period February 9, 1981, to April 13, 1981, and they reveal, based on the General Counsel's computation referred to above, that the number of machine days per week during that period exceeded the number of machine days per week for the department, for a comparable period of time 4–5 months before the decision to reduce the hours of the bagmakers. This includes the months of June and July when all of Respondent's machines were in operation.

pable of operating the side seal machine. In fact, Herbst also admitted that some months later Thompson was assigned to operate the #8 machine, and Azarev was assigned to the #7 machine. Herbst further testified that it was more economical for him to hire a new employee to operate the newly converted machine, rather than have it sit idle during the day and pay time and a half to operate this machine on overtime hours.

As an additional reason for the hiring of Azarev, Herbst testified also that Hersko was overburdened with work setting up and fixing machines. Thus, he decided to assign Weiler to help out Hersko in setting up machines, thereby creating an additional need for an operator to perform the work Weiler was unable to do because of his new assignments.

With respect to the Sunday overtime work, as noted above, Herbst admitted that he eliminated it after the election for bagmaking employees, except for Weiler who had the most seniority, because there was insufficient work available. As noted also, the printing department continued to receive Sunday overtime, even after the election.

The payroll records of Respondent revealed the following with respect to Sunday overtime:

During the period from March 12, 1980, to January 9, 1981, Respondent had Sunday work for 34 out of the 44 weeks in that period of time. Weiler was assigned to Sunday overtime in 27 of those weeks, Powell 15, Thompson 7, Ellis 4, and Arroyo 3.[17] Texas Clamp, from the printing department, worked six Sundays during this period of time.

During this period of time, the records reveal 6 weeks where other bagmakers were employed on Sundays, while Weiler was not working.[18]

From January 14 to April 22, 1981, the records reveal Sunday overtime for 3 weeks only in the bagmaking department, the week of March 4 when Weiler worked by himself on Sunday, and the weeks of April 1 and 8 when Powell and Weiler worked on Sundays.[19] During this same period of time, Clamp in the printing department, worked on seven Sundays, and Balsamo, the helper in the printing department, worked on five Sundays.

With respect to this issue, Respondent contends that the printing department was busier than the bagmaking department since Respondent performed printing work for outside customers' bags, as well as on bags manufactured by Respondent. Again no records or documents were introduced to substantiate this position.

With respect to the issue of Sunday overtime, Ellis testified that he did not like to work Sunday overtime because he preferred to go to church, and that Hersko was aware of this fact. Therefore, Hersko would only ask Ellis to work on Sundays when he was in a jam, and sometimes Ellis would agree.

Arroyo testified that, prior to the election, on a number of occasions, he would accept Hersko's offer to work on Sundays, but would then call up and say he could not make it for personal reasons. Accordingly, after a while Hersko got fed up with this conduct and would not ask Arroyo any more. On the few occasions when Arroyo did work on Sundays prior to the election, he asked Herbst about it and Herbst would authorize the Sunday overtime for him.[20]

On January 13, 1981, Thompson went out during lunch hour and bought coffee for himself, Ellis, Arroyo, and Powell. While Thompson was giving the coffee to Arroyo at Arroyo's machine, Hersko was there and asked Thompson where was his coffee. Thompson replied that he did not know Hersko wanted coffee, and besides he (Hersko) had coffee upstairs. Hersko replied that he did not want to see that happen again. Thompson asked what Hersko meant. Hersko responded that since this union thing and the election, he (Thompson) was picking sides and those joining the Union were sticking together. Thompson said Hersko was talking foolish and Hersko ordered him to come into the office.

In Hersko's office, Thompson accused Hersko of being a hypocrite, and that he was entitled to buy coffee for anyone he chooses. Hersko replied that, if he felt like treating the shop to coffee, to stop by the door and call the employees from the machine to the door. Thompson then said he was the boss and could make the rules, and suggested that he put the rule on the notice board. Hersko refused to put anything on the notice board, and they began to argue and use "indecent" language. Thompson told Hersko that it felt like he (Hersko) was trying to fire him (Thompson). Hersko replied that, if he wanted to fire Thompson, he could and that there are a lot of things he can fire him about, including reading the paper on the job. Thompson answered that everyone reads on the job, including Benny (Weiler), and that if he were fired, there are lots of ways he can get his job back easily. Hersko responded that there were lots of ways that Respondent can keep him out. Thompson concluded the conversation by saying that if he were fired he would go to the Labor Board.

Thompson testified that during the discussion with Hersko, Hersko did not say nor did he ask whether the employees were permitted to drink their coffee at their machine. Thompson admitted that, after this discussion with Hersko, he continued to go out to buy coffee for other employees as before, and they continued to drink their coffee at their machines.

E. *The Supervisory Status of Hersko and Magnotta*

As noted above, the supervisory status of Hersko and Magnotta are relevant to both the unfair labor practice and representation issues to be decided herein.

Hersko is the brother-in-law of Herbst, having married Herbst's sister. Additionally, two of Hersko's sisters are

[17] Arroyo had been out of work from March 1 to August 27, 1980.

[18] The weeks of March 12 and 19, April 23, June 11 and 18, and November 19. In addition, the records reveal that Weiler was the only bagmaker employed on Sundays, for 6 straight weeks, from December 3, 1980, to January 9, 1981.

[19] According to Herbst, these weeks were selected because Respondent had been closed during the Passover holidays, thereby losing some weekday work. The record also revealed that Ellis and Powell were offered and accepted work for the Sunday prior to the date the instant hearing commenced; i.e., May 3, 1981.

[20] As noted, Arroyo worked on three Sundays between March 12, 1980, and January 9, 1981.

employed in Respondent's office as bookkeepers. Neither Hersko nor his wife have any stock interest in Respondent, nor are they officers or directors of the Company.

In an affidavit given by Herbst to the Board, Hersko is referred to as plant manager. Herbst vehemently denies that Hersko is a plant manager and denies telling a Board agent that Hersko had that title. Herbst also claims that he did not read the affidavit before he signed it. I do not credit Herbst's testimony in this regard, and find that he did consider Hersko to be his plant manager. I found Herbst's testimony, particularly in this area, to be unimpressive and unpersuasive. I find that the information given in the affidavit at a time when Hersko's supervisory status was not in issue to be more reflective of the true facts with respect to Hersko's status.[21]

The record is undisputed that Hersko is a mechanic by profession, and the most highly skilled individual employed by Respondent. His duties include setting up jobs, fixing machines, making sure machines run properly, as well as performing shipping and receiving tasks. He also has an office where he performs certain paper work, and is a salaried employee who does not punch a timeclock.

Hersko is the individual who tells the bagmaking employees what work to perform. However, the machine operators' assignments are typed up on a job order in the office, resulting from Herbst's decision on what jobs are to be performed and on which machine the work is to be done. This sheet is given by Herbst to Hersko and then to the employees by Hersko, or placed on their machines.

In the case of Sterling, who as noted was a floorboy or a general helper, Hersko would assign him his tasks such as where and when to sweep the floor, stack the cardboard boxes, clean up some oil that may have spilled on the floor, or clean the core off the plastics. Hersko would frequently tell Sterling to stop one particular job that he was doing and start another one. On one occasion, Magnotta had requested Sterling's help on a job in the pressroom. Instead, Sterling went to the bathroom. When he returned, Hersko reprimanded him for not helping Magnotta, and told him that he must go immediately to Magnotta if Magnotta requests his assistance.

Hersko would also on occasion, where a rush order was required, change a machine operator or bagmaker from one machine to another. Hersko would also make sure the machines were operating properly and, if the work were not properly done, would order an employee to do the job over again or to correct any mistakes that the operator might make.

Testimony was adduced from various employee witnesses as to certain conduct engaged in by Hersko pertinent to his supervisory status. I have credited these witnesses as their testimony was mutually corroborative in many areas, was straighforward and believable, and consistent with what I deem to be the reasonable probabilities of the existing situation at Respondent's plant. Much of the testimony was undenied, and where denials were forthcoming from Herbst and/or Hersko, I do not credit their testimony based on comparative demeanor considerations, as well as the reasons set forth above in regard to Herbst's testimony *vis-a-vis* his affidavit given to the Board agent.

When Gifford Sterling was hired by Respondent, in March 1979, he was told by an employment agency representative to go to Respondent and see Sam Hersko for an interview. When he arrived on a Monday, he met Hersko as suggested.

Hersko looked at a paper Sterling had from the Employment Agency and asked Sterling where he was from, how long he had been in this country, and where he had worked before. Sterling gave Hersko a piece of paper indicating the name of his previous employer in England (British Printing Corp.) and his length of service for them. Hersko then informed Sterling that the work involved required moving and packing heavy boxes and that he was looking for someone younger.[22] Sterling asked Hersko to try him out and give him a chance. Hersko then told Sterling to come back on Thursday at 8 a.m., and told him the starting salary at Respondent was $2.90 per hour.

On Thursday, Sterling reported as requested. Hersko then gave him an application to fill out, as well as a W–4 form. Hersko looked at these forms and asked Sterling how many dependents he had. Sterling told him, and Hersko suggested that he add himself as a dependent and make it four on the form, which Sterling did.

Hersko then left the office for 3 to 4 minutes and returned with a time card. He showed Sterling where to punch in and where to work and informed him that the hours would be 8 a.m. to 6 p.m. Sterling began work that day.

Herbst and Hersko testified that Herbst made the decision to hire Sterling and that they did not even discuss the matter together. They assert that Herbst merely instructed Hersko to inform Sterling of his being hired. Herbst claims that it was he who had some doubts about hiring Sterling because of his age, since heavy work was required, but he decided to give Sterling a chance since there was a lot of work available at the time.

Ellis was hired in May 1979 as a packer. He was also referred by an employment agency to the Company. When he arrived he was told by an office worker to see Hersko. Hersko asked Ellis his background, where he had worked before, and how long he had been in the country. Hersko then gave Ellis an application form which he filled out and returned to him. Hersko looked at the application form, took a timecard from his desk, and wrote Ellis' name on it. Hersko then punched it in the timeclock and informed Ellis that he was now employed. Hersko did not leave the office at any time during this conversation.

Michael Thompson was hired in January 1979 as a machine operator. He was also referred by an employment agency and was directed to Hersko by an office employee. Hersko asked Thompson about his work experience and how long he had been a machine operator. He then asked him to fill out an application and a W–4 form and

[21] This affidavit was given in connection with charges dealing with the terminations of Sterling and presumably Otis Hudson, and was given prior to the election, wherein Hersko's supervisory status became determinative of the election results.

[22] Sterling is about 50 years old.

told him to report to work at 8 a.m. the next day. Hersko also informed Thompson that his salary would be $2.90 per hour. Hersko called over another employee named John, and instructed him to show Thompson the next day what machine he was to operate. Again, Hersko did not leave the office during this conversation.

Israel Arroyo was first hired by Respondent sometime in 1978. He also came from an agency and spoke to Hersko. Hersko asked Arroyo if he had any experience in plastics. Arroyo replied that he worked for a plastics company which made toys for 10 years. Hersko gave him an application form and W–4 form to fill out and told him that his starting salary would be $2.55 per hour. He then told Arroyo to report to work the next day. Arroyo began working on a machine, making bags on and off and putting them in boxes.

Neither Herbst nor Hersko denied any of the above incidents nor did they testify as to the specific hiring decisions of these individuals. However, Herbst and Hersko categorically deny that Hersko ever hired or recommended the hire of anyone, and contend that his role was merely to give prospective employees applications and inform them pursuant to instruction of Herbst that they are hired. Herbst also testified that he finds it unnecessary to interview unskilled employees, that he designates Hersko to give the application to the employees and then bring it back to him filled out, and that he alone decides based on the application whether or not to hire the individual.

Arroyo also testified without contradiction by either Herbst or Hersko that after quitting his employment he returned to work there in September 1980. He went to the plant about 2 weeks before his returning and spoke to Hersko. Arroyo asked Hersko for his job back. Hersko told him to wait a week until he (Hersko) makes a decision. Two weeks went by and Arroyo called. Hersko told him to come in to work which he did on September 2, 1980. Hersko did not deny Arroyo's testimony, nor did they offer any testimony as to the circumstances of Arroyo's returning in September 1980.

On the other hand, when Powell, who also had quit, sought to return to work in January 1979, he also spoke to Hersko. Hersko replied that things were slow and he (Hersko) would speak to Herbst. A few days later Powell was told by Hersko that he had spoken to Herbst and Powell could return to work which he then did.

Otis Hudson was hired by Respondent on May 20, 1980, as a bag machine operator. Hersko brought to Herbst's attention that Hudson was not running the machine properly. Hersko told Herbst on or about July 14, 1980, that he wanted to terminate Hudson. Herbst agreed and Hersko informed Hudson of his termination.[23]

As noted above, in connection with the termination of Sterling, Herbst admitted that it was only after Hersko brought to his attention that there was no more work for Sterling to do that he considered laying him off. Hersko's affidavit in this connection reveals that in the first week of November 1980 he told Herbst that he felt that the work was slow enough so that the services of Sterling were no longer needed and Herbst told him to let Sterling finish out the week.

Hersko, if a rush order must go out, would suggest to Herbst that the work cannot be gotten out unless overtime is authorized. Herbst would then authorize it and instruct Hersko to either ask or assign employees to work overtime and generally tell him which employees to ask or assign. However, the record also reveals that Hersko was aware of preferences of some workers like Ellis not to work on Sundays and would respect that preference and not ask Ellis except in an emergency.

The record also reveals that Sterling had to go to the hospital one day. He asked Hersko if he could leave early the next day to go to the hospital, Hersko said alright. As noted above, Thompson was not feeling well one day and asked Hersko if he could leave early. Hersko said okay but asked him to finish working on a particular roll first.

The record also reveals that sometime in 1979 Thompson was informed by Hersko that the following Monday he would be transferred to a different machine. Thompson asked Hersko about a raise. Hersko replied, "Not now, we'll see how you work the machine first. Right now business isn't good enough." Hersko added that he would see what he could do. Sometime after this conversation, Thompson received a raise.

As noted above, Hersko also discussed raises with Arroyo and told him that if he improved his attendance he would receive a raise.

The record also reveals that Hersko warned Arroyo on a number of occasions about his lateness. Additionally, as also noted above, Hersko reprimanded Thompson for not calling and notifying the office when he was not coming to work.

Magnotta is a printer. He is also a salaried employee who does not punch a timeclock. He spends all of his time in the printing department, operating a press and working with Clamp and Balsamo.

Magnotta lives close to the shop and is in possession of a key which he uses to open the door in the morning between 7:30 to 7:45 a.m. This is done because the printing presses need time to warm up in the morning.

Magnotta, Herbst, and Hersko testified that Magnotta neither possesses nor exercises any of the indicia of supervisory authority as set forth in Section 2(11) of the Act. The only contrary testimony is quite unsubstantial. Thus, Sterling testified that on one occasion in the summer of 1980, he called the plant 8:10 and told Magnotta that he would not be in because he was sick. Magnotta answered that it would be alright.

The record also reveals that in June 1980, Ellis came in a few minutes late. Magnotta confronted Ellis and criticized him for not calling and getting permission from Magnotta. Ellis replied that he did not know that he was supposed to ask Magnotta. Magnotta responded that "it's alright this time, but next time you do it you will be fired."

[23] The above finding is derived from Herbst's affidavit which, as noted, I believe to be more reflective of the true facts than Herbst's testimony that he merely asked Hersko how Hudson was doing and Hersko merely reported that he did not believe Hudson would turn out to be a good bagmaker. Hersko admitted that he reported to Herbst that Hudson was not able to perform his work satisfactorily and could not do the job of a machine operator.

Powell then came over to Ellis and told him that if he has any problem he should go to Herbst, because Frank is not the boss. Magnotta then came over to Powell and said that he is the boss and he has the authority to fire anyone that he wants to.

Later on in the day, Hersko approached Ellis and said that he heard about the incident between he and Magnotta and was sorry. Ellis then asked Hersko if he was going to be late and Hersko was not there, who should he call. Hersko told him that Jose (last name unknown) a foreman at the time, was the right person for him to call.

III. ANALYSIS

A. *Supervisory Status of Hersko and Magnotta*

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is well settled that Section 2(11) must be read in the disjunctive, and that supervisory status is established by the presence of any one of the criteria listed above.[24]

With respect to Hersko, who as noted above was considered by Herbst to be the plant manager[25] of Respondent, I find that the record discloses that he exercises sufficient authority to establish his supervisory status.

Thus, in my judgment, the evidence is sufficient to establish that Hersko possesses and has exercised the authority to hire employees. I have credited the testimony of employees Thompson, Arroyo, and Ellis that they were interviewed by Hersko, asked about their background and work history, and hired by Hersko on the spot, without Hersko's having left the office. This credited testimony contradicts the generalized denials of Hersko and Herbst that Hersko does not have the authority to hire and that Hersko's role in the hiring process is merely to obtain applications from prospective employees and to transmit Herbst's decision to hire them. Hersko's actions in interviewing the applicants and informing them of their hire without consulting with Herbst establishes that Hersko has exercised the authority to hire employees.

In the case of Sterling, Hersko again interviewed him and expressed some doubts about hiring Sterling because of his age and the heavy nature of the work. Hersko told Sterling to report on Thursday, and did not inform him of his being hired until he had reported, filled out an application, and Hersko had left the office for a few minutes. I find that in this instance, contrary to the unbelievable testimony of Herbst and Hersko that they never even discussed Sterling's hire, that Hersko and Herbst did discuss Hersko's concerns about hiring Sterling because of his age, and decided to give him a chance as he had requested. Thus, Hersko was involved in the hiring process and appears to have effectively recommended Sterling's being hired.

In addition, as noted, I have credited Arroyo's undenied testimony that when he requested his job back after quitting, Hersko insofar as this record discloses, without any consultation with Herbst, permitted him to return to work.

The record also discloses that Hersko brought to Herbst's attention that Otis Hudson was not running the machine properly and that he (Hersko) wanted Hudson terminated. Herbst agreed and instructed Hersko to terminate him. This evidence establishes that Hersko effectively recommended the discharge of an employee, and Respondent's own witnesses establish that Hersko effectively recommended the lay off of Gifford Sterling.

The above evidence is sufficient, without more, to establish that Hersko is a supervisor, even though he spends much of his time performing unit work.[26]

However, the record also discloses other evidence supporting the conclusion that Hersko is a supervisor within the meaning of Section 2(11) of the Act, such as his granting time off to employees,[27] responsibly directing the cleanup activities of Sterling,[28] issuing warnings and reprimands to employees, and his involvement in the decision to authorize overtime for Respondent's employees.

I therefore find that Hersko is and has been at all times material herein a supervisor of Respondent within the meaning of Section 2(11) of the Act.

Magnotta, as the record reveals, is a printer who spends all of his time performing unit work. The testimony of Magnotta as well as Herbst and Hersko that Magnotta does not possess or exercise any supervisory authority has not been contradicted by any substantial evidence from the General Counsel's witnesses, and is therefore credited.

The evidence that Magnotta once criticized Ellis for coming in late, and not calling and receiving permission from Magnotta, and then Magnotta threatening to fire Ellis if it happens again is hardly sufficient to establish Magnotta's supervisory status, particularly in view of the fact that later on Hersko told Ellis that he was sorry about the incident and refuted Magnotta's instructions that Ellis was obligated to call Magnotta when he was going to be late.

The other incident on which testimony was adduced, wherein Sterling called the shop and informed Magnotta that he would be in and Magnotta said alright, amounts to little more than Magnotta taking a message that Sterling would not be coming to work and hardly amounts to his granting permission for Sterling to take time off.

Accordingly, I find that the evidence has not established that Magnotta is a supervisor or an agent of Respondent.

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[24] *Southern Indiana Gas & Electric Co. v. NLRB*, 657 F.2d 878 (7th Cir. 1981); *NLRB v. Publishers Printing Co.*, 625 F.2d 746 (6th Cir. 1980), enfg. 233 NLRB 1070 (1977); *Hopp Topp Mfg. Co.*, 250 NLRB 1232 (1980); *Gurabo Lace Mills Inc.*, 249 NLRB 658 (1980).

[25] See *Scott's Wood Products*, 242 NLRB 1193 (1979).

[26] *Commercial Testing & Engineering Co.*, 248 NLRB 682 (1980); *Publishers Printing, supra; Gurabo Lace, supra.* See also *Margaret Anzalone Inc.*, 242 NLRB 879 (1979).

[27] *Hopp Topp, supra.*

[28] See *Publishers Printing, supra*, 233 NLRB at 1073 (status of Ronald Adams).

B. *The Alleged 8(a)(1) Violations*

The complaint alleges that Respondent by Hersko, its supervisor and agent, kept under surveillance the meeting places, meetings, and activities of the Union and the concerted activities of its employees. This allegation refers to the evening of November 6, 1980, wherein Hersko observed Sterling getting into the car of Local 98's organizer Jean Pierre, parked across the street from Respondent's plant. The General Counsel contends that since the evidence discloses that Respondent was aware that union activity was going on at the time, by virtue of its receipt of Local 98's telegram, coupled with the fact that Respondent is a small plant, warrants an inference that it was aware of the fact that a union meeting was scheduled for that evening. I do not agree. Although the record disclosed that the employees did discuss the union meeting among themselves at the plant, they made sure that no supervisors were present when such discussions occurred.

Even if an inference is warranted that Respondent knew of a union meeting scheduled for that evening, there is no evidence that Hersko or any Respondent official knew who Jean Pierre was, had ever seen her before, or in any way connected her to the union meeting set for that evening. The car was not marked, and insofar as Respondent was concerned, Jean Pierre could just as easily have been Sterling's wife or girl friend. Therefore, I find the evidence insufficient to establish that Respondent has engaged in surveillance of union or concerted activities.

Moreover, even if I were to draw the inferences requested by the General Counsel, that in view of the overall circumstances Respondent was aware that Jean Pierre was a Local 98 official and was driving Sterling to the union meeting, I would still recommend dismissal of this allegation of the complaint.

The alleged concerted activity herein, i.e., Jean Pierre picking up Sterling in her car to go to a meeting, was conducted in full public view, across the street from Respondent's property. When union officials engage in such activity, they should have no cause to complain that management observes them. Thus, Hersko's actions constituted no more than a brief inspection of open union activity and does not constitute unlawful surveillance in violation of Section 8(a)(1) of the Act.[29]

The complaint also alleges that Respondent, by Henry Herbst, gave employees the impression that it kept under surveillance the meeting places, meetings, and activities of Local 98 and the concerted activities of its employees. This allegation appears to refer to Herbst's statement to employees in late November 1980 that he was aware of the fact that the Union was trying to get into the shop and that there were union activities in the shop.

"Such generalized statement to employees, which are not directed to any employee's organizing activities, are insufficient to create the impression of surveillance."[30] Moreover, these comments made after Local 98's demand for recognition and filing of a representation petition were simply stating the obvious, since these events were not likely to have taken place without union activities having occurred.[31] Thus, these remarks would not reasonably be construed by employees as leaving the impression that supervisors spied on their activities to ascertain this information.[32]

Accordingly, I shall recommend dismissal of this allegation of the complaint.

During the same meeting with his employees, where Herbst made the above comments, Herbst announced that he did not want anyone speaking about the Union in the plant during working hours, and added that anyone found talking about the Union during this time would be fired. One employee asked about after working hours and Herbst replied, "That's your time." These remarks are alleged by the General Counsel to constitute unlawful threats of discharge in reprisal for their support and assistance to Local 98.

Respondent contends that Herbst's remarks are not unlawful, since an employer may have and enforced a rule prohibiting solicitation by union and other employees in working areas during working hours. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). However, while an employer may have and enforced such a no-solicitation rule, it has an obligation to clarify any ambiguity that may arise as to its meaning. The Board has held that a rule prohibiting solicitation during "working hours" or on "working time" is presumptively invalid, and that an employer who enforces such a rule must clarify to the employees, in order to overcome such a presumption, that it does not apply to breaktimes, mealtimes, or other nonwork periods. *TRW Bearings*, 257 NLRB 442 (1981).

Thus, in the instant case, Respondent's only clarification was Herbst's answer to a question by an employee that "after working hours" is their own time. Nothing was mentioned about breaktime or mealtime, and thus the rule could reasonably be susceptible of an interpretation that it applied to these periods of time, and is therefore unlawfully broad.[33] Thus, Herbst's threat to discharge for violation of this rule would be violative of Section 8(a)(1) of the Act.

Moreover, even if Respondent had sufficiently clarified the rule's application, in these circumstances, the rules' promulgation and enforcement was discriminatory and unlawful. Prior to the appearance of Local 98, there was no evidence of any rule prohibiting any form of discussion among employees and, on the contrary, the record reveals employees were permitted to converse freely. Even after the advent of Local 98, Respondent's prohibition on discussions were related solely to union discussions, and not to other types of conversations. Such a rule which restricts only conversations relating to unions is discriminatory and therefore unlawful.[34]

[29] *Palby Lingerie Inc.*, 252 NLRB 176 (1980); *Porta Systems Corp.*, 238 NLRB 192 (1978); *Chemtronics Inc.*, 236 NLRB 178 (1978).

[30] *Palby Lingerie, supra.*

[31] *Brooks Shoe Mfg. Co.*, 259 NLRB 488 (1981).

[32] *Lamar Outdoor Advertising*, 257 NLRB 90 (1981).

[33] *Conagra Inc.*, 248 NLRB 609 (1980); *TRW, supra.*

[34] *Liberty Nursing Homes*, 245 NLRB 1194 (1979); *Story Oldsmobile*, 244 NLRB 835 (1979); *Atlas Metal Parts Co.*, 252 NLRB 205 (1980), enfd. 660 F.2d 304 (7th Cir. 1981).

Accordingly, I find that Herbst's threat to discharge employees in violation of this discriminatory and overly broad rule is violative of Section 8(a)(1) of the Act,[35] as well as Respondent's discriminatory promulgation of such a rule restricted to union conversations.[36]

The complaint also alleges that Respondent, by Hersko, on January 13, 1981, unlawfully threatened to discharge its employees because of their support for Local 98. This allegation refers to the discussion between Thompson and Hersko, which was precipitated by Hersko complaining to Thompson about the latter failing to bring him coffee while bringing it for other employees. Hersko equated Thompson's actions with Thompson's sympathies for Local 98, by attributing it to the fact that since the Union and the election, he (Thompson) was picking sides and those joining the Union (those for whom Thompson bought coffee) were sticking together. Thompson's reaction to Hersko's remarks, that he was privileged to buy coffee for anyone he wants, and calling Hersko a hypocrite, resulted in some harsh words between them and Hersko suggesting that he could easily find things to fire Thompson, including reading papers on the job. I find that in these circumstances, Hersko, obviously annoyed about the election and the employees including Thompson sticking together in their support for Local 98, precipitated the argument with Thompson over an obviously trivial matter, in order to threaten him with discharge in reprisal for his union activities, and that Hersko's threat to fire him was therefore violative of Section 8(a)(1) of the Act.

The record reveals that shortly before the January 9 election, Hersko had conversations in his office or in his car with employees Powell, Ellis, Thompson, and Arroyo. Although the words and responses used were somewhat varied in these discussions, it is apparent that a common theme and message was imparted to the employees from Hersko and therefore Respondent. The message was that Respondent wanted employees to vote for Local 5 in the pending election, that it preferred dealing with Local 5 which it characterized as "our union," that the employees would be no better off with Local 98 than with Local 5, and that they would receive the same benefits if they stayed with Local 5 than they would receive should Local 98 get in, and Respondent would not grant benefits Local 98 would request. In the case of Arroyo and Ellis, Hersko raised the possibilities of a bonus and a raise respectively for them if Local 5 wins and Local 98 loses the election. Additionally, Hersko commenced the conversation with Thompson by asking if he considered what he was going to do in the election and with Arroyo by asking, "how do you like the coming election?"

While it is true, as Respondent contends, that an employer may lawfully state its preference between competing unions in a representation election,[37] it may not accompany such statements with other coercive conduct.[38]

In the instant case, Hersko accompanied his remarks stating a preference for Local 5 with statements which constitute various violations of the Act, such as promising raises and bonuses to employees if Local 5 wins and/or Local 98 loses;[39] and telling employees that they would be no better off with Local 98 than Local 5 and would receive the same benefits if they stayed with Local 5, as well as the fact that union activities would not work, which constitute unlawful threats of futility,[40] as well as unlawful promises of benefit.[41] Additionally, Hersko asked Thompson if he considered what he was going to do in the election and Arroyo how he likes the coming election. These questions, clearly designed to elicit a reply from Thompson and Arroyo as to how they would vote in the upcoming election, are unlawful interrogations in violation of Section 8(a)(1) of the Act and I so find.[42]

Accordingly, I find that Hersko's statements of preference for Local 5 in the pending election, accompanied by the unlawful conduct set forth above, has unlawfully interfered with the rights of its employees to choose their collective-bargaining representative, and unlawfully assisted Local 5 in violation of Section 8(a)(1) and (2) of the Act.[43]

C. *The Alleged Harassment of Employees*

The complaint as amended alleges that Respondent in late November 1980, by Hersko, harassed its employees by engaging in closer supervision than it had done theretofore, in violation of Section 8(a)(1), (3), and (4) of the Act. The only evidence adduced in support of this allegation is the testimony of Michael Thompson.

While his testimony revealed that Hersko criticized him regarding his appearance at the NLRB hearing, it is apparent that the criticism was directed at Thompson

[35] *Fluid Packaging Co.*, 247 NLRB 1469 (1980).

[36] See *Atlas Metal, supra; Story Oldsmobile, supra; Liberty Nursing, supra.*

Although the complaint does not allege that the promulgation or enforcement of the no solicitation was violative of the Act, the matter was fully litigated, since the threat to discharge allegations arising out of this rule was contained in the complaint, and Respondent was fully aware that Herbst's remarks were in issue. In these circumstances, I am not precluded from finding a violation based on alternate theories to those alleged in the complaint. *C & E Stores*, 221 NLRB 1321 (1976).

[37] *Raley's Inc.*, 256 NLRB 1146 (1981); *Stewart-Warner Corp.*, 102 NLRB 1153 (1953); *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir. 1980).

[38] *Raley's, supra; Michael M. Schaefer*, 246 NLRB 181 (1979).

[39] *Lyman Steel Co.*, 249 NLRB 296 (1980).

[40] *El Monte Tool & Die Casting*, 232 NLRB 186 (1977); *Kenworth Trucks of Philadelphia*, 229 NLRB 815 (1977).

The record also reveals that sometime in September 1980, Magnotta informed Thompson that the men were trying to get a Union in, and "it won't work." This remark is alleged in the complaint to be an additional threat of futility. Since I have found the evidence insufficient to establish Magnotta's supervisory or agency status, Respondent is not responsible for his comments. Thus, I need not determine whether this remark by Magnotta constitutes an additional example of a threat of futility.

[41] *American Telecommunications Co.*, 249 NLRB 1135 (1980); *Joint Industry Board of the Electrical Industry*, 238 NLRB 1398 (1978).

[42] *Schwan's Sales Enterprises*, 257 NLRB 1244 (1981); *Kenworth Trucks, supra.*

Although the complaint contains no allegation of unlawful interrogation, Respondent was on notice that Hersko's remarks in these conversations were in issue and I find that his conduct was fully litigated. Thus alternate or additional theories of violations with respect to his statements are permissible. *C & E Stores, supra.*

[43] *Lyman Steel, supra; River Manor Health Related Facility*, 224 NLRB 227 (1976).

having failed to call the night before to tell Respondent, rather than his appearing or testifying at the hearing.[44]

He was not criticized when he actually attended the hearing, since he called ahead of time as instructed, and Hersko in fact wished him good luck.

Thompson testified that, after he returned from the hearing, Hersko would come to his machine more frequently than usual, and would look at him, pull out bags, measure them, and test the seal. Thompson could not be any more specific as to how often Hersko came to his machine either before or after the hearing, nor how long this alleged closer supervision lasted. It is admitted that he received no criticism or reprisals from Hersko as a result of this alleged "supervision." I find this evidence far from sufficient to establish a violation of the Act.

As noted, no animus was directed towards Thompson for his participation at the hearing or his Local 98 activities during this period of time. The criticism directed toward him by Hersko related to his failure to call in the night before and therefore be informed that the hearing was postponed rather than his appearing at the hearing.

More significantly, Thompson's skimpy, conclusionary, and uncertain testimony does not establish that Respondent engaged in "closer supervision," by a preponderance of the evidence. Thus, Hersko merely looked at Thompson, pulled out bags, and tested seals, which are admittedly part of Hersko's regular routine. Thompson's testimony that Hersko engaged in this conduct "more than usual" after the hearing without any more testimony as to detail, specificity, or duration, is in my judgment insufficient to warrant a finding of a violation of the Act, even though Thompson's testimony was not denied by Hersko. I shall therefore recommend dismissal of this allegation of the complaint.

The other incident of alleged harassment in the complaint, relates to the contention that on January 13, 1981, Respondent "harassed its employees by forbidding the employees to take their coffee breaks in the place where they had previously been permitted to take such breaks." This allegation relates to the incident described above, involving Thompson and Hersko, wherein I have found that Hersko started an argument with Thompson, concerning Thompson's buying coffee for employees and not for him, and then unlawfully threatened him with discharge.

However, I do not believe that the evidence warrants a finding as alleged in the complaint that Respondent changed the place where employees had been permitted to take their coffeebreaks. In fact, the record reveals that, although the discussion related to having coffee, the incident occurred during lunch hour, there was no discussion or even mention of coffeebreaks, and in fact there is no evidence in the record that Respondent even had a policy of breaks, nor a specific place where employees were permitted or authorized to take them.

Moreover, even if this allegation were to be construed as relating to where employees could drink coffee on their lunch hour, the evidence does not disclose any change in the policy. Although at one point in the discussion Hersko informed Thompson that if he wanted to buy coffee for employees he should call them from the machine to give it to them, he did not indicate where employees were required to drink their coffee. In fact, the record reveals, as admitted by Thompson, that despite this comment of Hersko, he continued to buy coffee for employees and they continued to drink it at their machines, in the same manner and pursuant to the same procedure as they had in the past. Thus, I conclude that the General Counsel has not established any change in the place where employees were permitted by Respondent to drink coffee or take coffee or any other breaks, and I shall recommend dismissal of this allegation of the complaint.

D. *The Termination of Gifford Sterling*

In evaluating Respondent's decision to layoff Sterling on November 7, 1980, it is necessary to first examine the relationship that existed prior thereto between Respondent and Local 5, the incumbent Union. It is obvious that Local 5 was representing the employees of Respondent in name only, and that at best there existed a somewhat "cozy" relationship between the parties. Thus, the large majority of Respondent's employees were, notwithstanding the existence of a union-security clause in the contract, not members of Local 5, had never been told of the existence of Local 5, and in fact had never heard of Local 5 until the appearance of Local 98. Herbst clearly gave whatever raises and benefits to his employees that he chose, and did so without consultation with or permission from Local 5. No grievances were ever processed or filed by Local 5, which had no shop steward in the shop, and the record reveals, sent a business agent to the shop only after Local 98 began its organizational activities and made a demand for recognition upon Respondent. Therefore, it is apparent that Respondent would be and in fact was most anxious to continue this relationship with Local 5 and to stifle the efforts of its employees to replace Local 5 with a union of their choice, Local 98.

Respondent manifested its feelings in this regard by its unlawful conduct as found above, of threats to discharge employees, threats of futility if they chose to be represented by Local 98 or engaged in activities in support of Local 98, interrogations concerning their union activities, promises of a bonus, raises, and other benefits if they rejected Local 98 and selected Local 5, coupled with statements of preference for Local 5, that Local 5 was Respondent's union and that employees would receive the same benefits if they stayed with Local 5 as they would if they chose Local 98.

The record also reveals that on November 7, the date of Respondent's layoff of Sterling, it had both general knowledge of the existence of union activity by its employees on behalf of Local 98, as well as of specific Local 98 activity engaged in by Sterling. Thus, Respondent on October 26, 1980, received a demand letter from Local 98, claiming that it represented a majority of Respondent's employees. Herbst, as I have found above, admittedly suspected that Sterling was one of the Local 98

[44] As noted, the original hearing was postponed, and, if Thompson had called as instructed, he would have been notified and been able to come to work on time.

supporters, based on his being "part of the clan,"[45] but was uncertain about Sterling's support for Local 98 until he received the telegram on November 7 at 9:30 a.m. from Local 98, indicating that Sterling was in fact one of the card signers for Local 98.[46].

Respondent, on the very afternoon that it received this telegram and thereby became sure that Sterling was a Local 98 supporter, notified him that he was laid off for lack of work.

The foregoing facts proving Respondent's animus towards Local 98, as well as knowledge of Sterling's activity and highly suspicious timing, are more than sufficient to establish a strong *prima facie* case of discriminatory motivation as to Sterling's layoff.

Respondent has fallen far short of overcoming the General Counsel's *prima facie* case. Its defense consisted of self-serving and generalized testimony of Herbst and Hersko that there was insufficient work available for Sterling to perform.[47] Respondent introduced no documentary evidence of the alleged adverse business conditions which it contended required the layoff.[48]

In fact, as noted above, the only documentary evidence submitted into this record, from the General Counsel, indicates no substantial downturn in work available on November 7.[49]

Testimony was adduced from the General Counsel as well as Respondent's witnesses that in June or July 1980, Respondent was operating with 8–9 machines in the bagmaking department, while on November 7, only 5–6 were operating. Respondent argues that therefore it is not compelled to keep all its employees when business is slow and it is operating at 50–60 percent of capacity. However, no explanation was proffered by Respondent as to why it selected the November 7 date for Sterling's layoff. Thus, there was no reason given why November 7 was any different as to work availability than August, September, or October 1980. Thus, "Respondent can point to no contemporaneous event which might have motivated the layoff at that time."[50]

Moreover, the record reveals that notwithstanding any lessening of machine work, Sterling's functions were still necessary. Thus, he operated a machine only occasionally, and his responsibilities and duties as a helper, of cleaning up, taking out the garbage, helping out in the printing department and in shipping and receiving, and stacking boxes, were still essential, and were in fact performed by Thompson, Clamp, and the other unit employees. Respondent also hired two employees after the layoff, without even considering recalling Sterling. While Azarev was a full-time machine operator, he spent 1-1/2 hours of his day performing cleanup work previously performed by Sterling. While Balsamo, contrary to Sterling, worked full-time in the printing department, Balsamo's functions as a helper of cleaning the ink trays, pans, and excess plastic, and helping to change and move the presses, are basically unskilled and menial tasks, identical to the functions performed by Sterling when he had helped out in the printing department while he was employed by Respondent, and functions that Respondent has not shown that Sterling could not have performed on a full-time basis. Yet, as noted, Respondent did not consider recalling Sterling when it hired Balsamo.

Accordingly, I am persuaded that based on the above analysis, the General Counsel's contention that the layoff of November 7 was attributable to Sterling's activity on behalf of Local 98 has been substantiated by the record. Respondent has not shown any other reasonable explanation for the selection of that date to layoff Sterling and has therefore failed to rebut the General Counsel's *prima facie* case.[51]

I therefore conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by its layoff and refusal to recall Sterling, and I so find.

E. *Postelection Events*

1. Alleged denial of wage increase and bonus to Arroyo

The complaint alleges that on or about January 12, 1981, Respondent denied Arroyo pay increases, bonuses, and other benefits, because said employee joined and assisted Local 98. The record reveals that in early December Hersko and Arroyo had a discussion about a raise and Hersko told Arroyo that he was working on a raise of 25 cents an hour for everyone, but that he should try to come in everyday so that he could get it. (Arroyo had a long history of poor attendance). There was no mention of the Union nor the election during this conversation. Immediately after this discussion, Arroyo was out of work for 10 days in a row, and when he returned was told he did not receive the raise because of his poor absence record. I find that the failure to give Arroyo a raise at this time was not unlawful, since he was told he must come in to work in order to receive it, and he was immediately out of work for 10 days thereafter.

The evidence also reveals that sometime during the week before the election, Hersko informed Arroyo that if Local 5 won there was a possibility of a bonus for Arroyo, and Arroyo replied that he might vote for Local 5. On the day of the election, after the results were announced, Hersko rhetorically criticized Arroyo for making a mistake in the vote by asking Arroyo, "do you realize what you have done?" Arroyo admitted that he had made a mistake.

On January 12, 1981, the next working day, Arroyo asked about the bonus, and Hersko replied that he could

[45] Respondent's minority employees.

[46] The record does not establish the reason for Herbst's uncertainty as to Sterling's support nor why he felt that Sterling "would be the last one I would suspect." However, it may well have been that Herbst felt that Respondent had given Sterling a break when they took a chance and hired him as packer when he was over 50 years old for a job which required extensive physical work. Additionally, Respondent kept Sterling on long after having laid off all of the other packers. Thus, it is conceivable that Herbst believed that Sterling would be grateful for Respondent having treated him so well, and would not repay Respondent by supporting Local 98.

[47] *Smedberg Machine & Tool*, 249 NLRB 534 (1980).

[48] *Hedison Mfg. Co.*, 249 NLRB 791 (1980); *Capriccios Restaurant*, 249 NLRB 685 (1980).

[49] *Smedberg Machine, supra.*

[50] *Behring International*, 252 NLRB 354 (1980). See also *Maximum Precision Metal Products*, 236 NLRB 1417 (1978).

[51] *Banks Engineering Co.*, 231 NLRB 1281 (1977).

not help because he had lost all his titles since the Union came in and suggested Arroyo go to "his representative," if he wished a bonus.

The General Counsel agrees that these facts establish a discriminatory refusal to grant Arroyo a bonus. I do not agree. Although the record reveals, as I have found above, that Respondent unlawfully promised Arroyo a possible bonus to influence his vote in the election, there is no credible evidence that such a bonus was ever actually decided upon, planned, or contemplated by Respondent. In fact, no other employees received any bonuses, and the evidence does not disclose any evidence of a regular practice of Respondent to grant bonuses to employees at any time. Accordingly, I find no basis for the General Counsel's position that Respondent discriminatorily withheld a bonus from Arroyo. Accordingly, in the absence of sufficient evidence to establish that there was either a regular practice to grant bonuses, or that Respondent had decided upon a bonus for Arroyo, there can be no finding of a discriminatory refusal to grant Arroyo a bonus or an increase. I shall therefore recommend dismissal of this allegation of the complaint.

However, Hersko's comments to Arroyo that implied that Arroyo's failure to vote for Local 5 and against Local 98, would prevent him from receiving a bonus, do constitute unlawful threats in violation of Section 8(a)(1) and I so find.[52]

2. Reduction in hours and overtime

The complaint alleges that since January 12, 1981, Respondent provided its employees, Thompson, Arroyo, Ellis, and Powell with less employment than they previously and normally would have received, because said employees joined and assisted Local 98. This allegation refers to the actions taken by Respondent on January 12, 1981, the first working day after the election, to reduce employees hours, change their lunch hour procedure, and reduce Sunday overtime. These changes were instituted only for the bagmaking department, while the printing department continued to operate in the same fashion as prior to the election. I would note in this connection that Respondent was clearly aware that the support for Local 98 was centered in the bagmaking department, containing members of "the clan" as testified to by Herbst.

These actions were taken by Respondent on the first working day after the election, during which the employees, despite Respondent's intensive unlawful campaign as outlined above, to persuade them to vote for Local 5, continued to support Local 98.[53]

Respondent's obvious annoyance at the results of the election was manifested by Hersko's criticism and accusation that Arroyo made a mistake in the vote and his unlawful threat to withhold any possible bonus from Arroyo because of his voting for Local 98, and of the employees support for Local 98 in the election.

The foregoing facts, coupled with the animus displayed by Respondent towards Local 98 as outlined above, as well as its unlawful termination of Sterling, establish a *prima facie* case of discriminatory motivation in Respondent's actions to change lunch procedures and reduce work opportunities for its bagmaking employees on January 12, 1981.[54]

Once again Respondent has fallen far short of rebutting or overcoming a strong *prima facie* case established by the General Counsel. Again Respondent adduced only generalized, undocumented, and unsupported testimony that work was slow and justified the actions that it took.[55]

With respect to the change in lunch hour procedure, I note that Herbst's own testimony, as quoted above, establishes that economic reasons were not the cause of this decision. Thus, Herbst testified that, although he had permitted employees to work through lunch and eat while they work for many years, this was really not the way to run an operation. His testimony that "work done while you eat is not work that you do while you don't eat," that "it is unheard of in any place of employment for an employee to work while eating," and that "every employee asked for it and I was stupid enough to do it and an employee while he is working should not eat lunch," reveals that lack of work did not motivate this decision. While Herbst's testimony as to the efficiency of having employees working while they eat is not unreasonable, the fact is that Respondent permitted such a situation to exist for many years, without apparent question or criticism. To suddenly decide on the first working day after the election that workers perform better while not eating lunch, and changing its lunch procedure, thereby depriving employees of a half hour of paid time, can only be described as an example of retaliation against its employees for its efforts to support Local 98 in the election and I so find.[56]

With respect to the reduction of working hours from a day of 8 a.m. to 6 p.m. to 8 a.m. to 4 p.m., and a reduction in Sunday overtime, again as noted, Respondent failed to substantiate by record or testimony its contention that the action was warranted by lack of work. I note in this connection that the only records submitted in this regard, by the General Counsel, tended to support the General Counsel's position and undermine Respondent's defense. Thus, although records for January were not available, records for the period February through April demonstrated that the number of machine days per week equaled or in some cases exceeded the number of such days during the months of June and July 1980, when Respondent claims it was busier and it was operating all or most of its machines. Moreover, as in the case of Sterling's layoff, Respondent one again could point to no contemporaneous event which might have motivated the layoff at that time; i.e., January 12, 1981.[57] Thus, it

[52] *Woonsocket Spinning Co.*, 252 NLRB 1170 (1980).

[53] Although the results of the election were undeterminative due to the challenges to Hersko's and Magnotta's ballot, I find that Respondent was aware that Hersko was and would be found to be a supervisor of Respondent, thereby making Local 98 the winner in the election and ending Respondent's theretofore "cozy" relationship with Local 5.

[54] *Larsen Supply Co.*, 251 NLRB 1642 (1980); *K. W. Norris Printing Co.*, 232 NLRB 985 (1977); *Empire Shirt Trimming Co.*, 240 NLRB 626 (1979).

[55] *Smedberg Machine, supra; Hedison Mfg., supra.*

[56] *Larsen Supply, supra.*

[57] *Behring Intl., supra.*

has failed to show any reasonable explanation other than the election results for its selection of that date. See *Banks Engineering, supra.*

In addition, the record reveals that a new employee, Azarev, was hired at the same time to work in the bagmaking department where these changes were made. Herbst gave an explanation for the hire of this employee, that he changed one of his machines thereby creating new work. However, the record reveals that other employees could have and in fact did operate this new machine, and could have done so during the hours curtailed by Respondent. It is of course true that it may not always be economically feasible to operate on overtime when new work becomes available. However, it must be emphasized that Respondent has operated for years on this same schedule with Sunday overtime, and to change these longstanding terms and conditions of employment for lack of work at the same time that a new employee is hired on the day after the election is highly suggestive of discriminatory motivation.

With respect to the Sunday overtime change, as noted, Herbst testified that he decided to eliminate it for all bagmaking employees, except that, where Sunday overtime is required, Weiler would be assigned it since he is the most senior employee. However, although Weiler was the most senior employee, there is no evidence in the record that Respondent assigned overtime in the past, in whole or in part based on seniority. Although the record does reveal that prior to the appearance of Local 98 and/or the election, Weiler did receive Sunday overtime more frequently than other employees, the record also reveals at least 6 weeks where other employees worked Sunday overtime on days that Weiler was not working. Thus, it appears that Respondent's decision to give Weiler first preference for overtime was a change from prior conditions of employment, and was also discriminatorily motivated. It is admitted by Herbst that Weiler was not a part of "the clan," and therefore perceived by Respondent not to be a Local 98 supporter. Therefore, its decision to eliminate Sunday overtime for all Local 98 supporters in the department, and to continue it (although on a curtailed basis) for the one employee in the department believed by Respondent not to be such a supporter, is further demonstrative of Respondent's intent to unlawfully discriminate against its employees for their protected union activities.

Accordingly, I find that Respondent has not rebutted the General Counsel's *prima facie* case of discriminatory motivation in these areas, and that it has violated Section 8(a)(1) and (3) of the Act by its actions in changing lunch hour procedures, reducing hours, and reducing Sunday overtime work.[58]

[58] With respect to Sunday overtime work, the record reveals that Respondent was aware that Ellis did not like to work Sunday overtime because of his religious beliefs, and that even prior to the appearance of Local 98, he was rarely asked to work on Sundays. Additionally, the record reveals that Arroyo had a tendency to accept the assignments and then cancel at the last minute, thereby causing Respondent not to call him again, also prior to the advent of Local 98. However, these employees did work occasionally on Sundays prior to the election, and Respondent's policy of refusing to consider asking them at all after the election is still violative of the Act. The above factors can and should of course be considered in the compliance stage of this proceeding, when backpay for Ellis and Arroyo, because of this discrimination is computed.

F. *The Representation Case*

I have been directed to make a determination as to the challenged ballots of Isaac Hersko and Frank Magnotta in Case 29-RC-5205. Inasmuch as I have found Hersko to be a supervisor within the meaning of Section 2(11) of the Act, I shall recommend that the challenge to his ballot be sustained.

I have also found that the record has not established Magnotta to be a supervisor, which ordinarily would warrant a recommendation that the challenge to his ballot be overruled, and his ballot be opened and counted. However, in view of my finding with respect to Hersko's ballot, Magnotta's ballot is no longer determinative of the election and it need not be opened nor counted. Thus, with the challenge to Hersko's ballot sustained, the revised tally of ballots becomes four votes for Local 98, two votes for Local 5, and one challenge, which is not determinative of the results of the election.

Accordingly, I shall recommend that a certification of representatives be issued in Case 29-RC-5205 certifying Local 98 as the collective-bargaining representative of Respondent's employees.

IV. CASE 29-CA-8949

The complaint in Case 29-CA-8949, issued on July 30, 1981, and amended at the reopened hearing, alleges that Respondent, since on or about May 8, imposed more onerous working conditions upon its employees, thereby causing the constructive discharges of Powell and Ellis on May 22 and May 15, respectively, because of their activities on befalf of Local 98 and because of their having given testimony in prior representation and ULP hearings.

As noted, Respondent utilizes machines in the bagmaking department. Each of these machines has a number. Ellis operated the number 1 machine, Powell the number 3 machine, and they shared operation of the number 2 machine. Each machine has a device which controls the speed of the machine, with numbers 1 to 10, the higher the number meaning, the faster the machine would operate. The machines are generally set up by Hersko, but on occasion by the employee. Hersko is responsible for the operation of the machine and is admittedly the most knowledgeable about the machines and how fast a particular machine should be set up at. This decision depends largely upon the size of the particular bag that is being made on the machine. Both before and after the hearing, as part of Hersko's regular functions, he would at times, after a machine has been set up and while it is operating, come over and either lower or raised the speed on the machines, depending upon how the product is coming out.

The initial phase of the instant hearing concluded on May 8, 1981. The employees returned to work at Respondent's premises on Monday, May 11. According to the testimony of Ellis, Powell, and Thompson, for a 2-week period from May 11 to 24, their machines were excessively speeded up by Hersko, which made it more dif-

ficult and pressured for them to work. They claim that Hersko would come around more often than he did prior to the hearing, in order to turn up the speed on their machines. Hersko denies that he speeded up the machines any more frequently or more excessively than he had done prior to the hearing, and that the production for the machines operated by these employees was normal during this period of time. Hersko and Herbst testified that there were more rush orders during the first week or two after the hearing, since Respondent operated only on a required basis during the prior week, when many of Respondent's employees and supervisors were present at the Regional Office for the hearing.

With respect to this issue, the General Counsel introduced production records of Respondent into the record, and submitted a chart of these records for 3 weeks of Respondent's operations in the bagmaking department. This compilation, which shows the number of bags produced by week by each machine and allegedly corroborates the testimony of the General Counsel's witnesses, is set forth below:

Machine	4/13-4/20	5/11-5/17	5/18-5/25
1	-	58,056	28,737
2	-	39,663	46,112
3	65,522	88,833	72,250
4	31,333	42,000	54,300
5	147,250	81,200	
6	31,930	39,566	
7		10,719	20,012
8			23,644
9			
10			
TOTAL	276,035	360,037	245,655

I find that the testimony of Powell, Ellis, and Thompson with respect to this phase of the hearing in general and on this issue in particular to be contrived, vacillating, and unconvincing. Additionally, their testimony was contradicted by their pretrial affidavits, was at times different on significant points on cross-examination from testimony given on direct, and was inconsistent with testimony given by each other.[59] Hersko on the other hand I found in this portion of the hearing to be straightforward, candid, and believable. I therefore credit Hersko and discredit the testimony of Thompson, Ellis, and Powell that for the 2 weeks after the hearing, Hersko speeded up their machines more frequently and more substantially than he had done prior to the hearing.

I have also considered the General Counsel's chart of production records, which I find to be insufficiently probative of the General Counsel's contention. Thus, the chart compares production records for only 3 weeks, the week of April 13-20 with the 2 weeks after the hearing. In fact, the 1 week before the hearing contained no figures for the number 1 and number 2 machines which were operated by Ellis and Powell. No figures were presented for any other weeks nor any other evidence to establish that the week chosen by the General Counsel for comparison, April 13 to 20, is an average or normal week. Although the week of May 11 to 17 shows 86,000 more bags than the week of April 13 to 20, such does not establish that machines were excessively speeded up that week. I note in this connection that there were more rush orders the first week of the hearing, due to Respondent's loss of production the prior week because of the hearing. Thus, any increase of production during the week of May 11 to 17 that may be found to have occurred, I believe to have been due to the necessity of Respondent to make up for its loss of production the prior week.

I also rely in making my finding that no substantial or excessive speed up occurred during the weeks after the hearing, upon the testimony of John Barry, an expert witness called by Respondent, who corroborated the testimony of Hersko that running these machines at excessive speeds would produce defective bags. In this connection, all the employees admitted that no defective bags were produced during this period. Thus, it would make no sense for Respondent to speed up the machines substantially since the result would be a defective product.

The General Counsel also adduced testimony from Thompson and Powell with respect to Hersko's actions when they left their machine to go to the bathroom. According to these employees, prior to the hearing they would turn off their machines and go to the bathroom, and when they returned they would start the machine up and continue working. After the hearing, however, they contend that for the first time Hersko, when they went to the bathroom, would turn on and operate their machines.

Powell testified that, with respect to his machine, Hersko would turn it on and walk away leaving it running, making extra work for Powell when he returned. Hersko testified that both before and after the hearing it was his normal practice to turn on and operate machines of employees when they went to the bathroom, but that he never did or would turn on a machine and leave. I once again credit Hersko's testimony over that of Thompson and Powell and find that after the hearing Hersko, as he had done prior to the hearing, would operate machines of employees while they were in the bathroom. In addition to my reasons set forth above, with respect to my assessment of the testimony of these witnesses during the reopened hearing, I note that Thompson and Powell differed among themselves in their testimony as to whether Hersko left their machines unattended. I find it totally incomprehensible as testified to by Powell, that Hersko, as a supervisor of Respondent would turn on an employee's machine and then walk away without someone to watch the machine.

Thus, since I have found that the General Counsel has not established that Respondent, after the hearing, either speeded up machines of employees or changed its procedure with respect to the operation of an employee's machine when they go to the bathroom, I find no evidence to support the allegation in the complaint that Respond-

[59] For example, Ellis testified a number of different ways as to how frequently and to what level Hersko speeded up his machine, and the machine he shared with Powell, which testimony differed from his own affidavit, as well as the testimony of Powell in several significant respects.

ent imposed more onerous working conditions upon its employees. I shall therefore recommend dismissal of this allegation of the complaint.

In order to establish an allegation of constructive discharge, it must be shown that an employer deliberately made working conditions of employees so intolerable that they were forced to quit, and that these actions were motivated by protected or union activity engaged in by such employees.[60] The Board has further defined the appropriate standard as whether "Respondent precipitated a plan or created an atmosphere which made it impossible for [an employee] to work under normal or reasonably normal conditions." *John S. Barnes Corp.*, 165 NLRB 483, 484 (1967).

Under no conceivable reading of this record can the conclusion be drawn that the requirements for a constructive discharge have been met. Since I have found above that Respondent did not violate the Act by imposing more onerous conditions upon its employees, and the record contains no other evidence of the creation by Respondent of any other conditions of employment which motivated Powell or Ellis to quit, I need not go any further in my analysis in order to dismiss the allegations of constructive discharge. However, even if I were to have found that Respondent did unlawfully speed up the machines as alleged by the General Counsel, the record would still fall far short of establishing the requisites for a constructive discharge.

I find that the record fails to establish that these allegedly "onerous" conditions motivated the decisions of either Powell or Ellis to quit their jobs at Respondent. Ellis admitted that he thought about quitting from the time that the charges were first filed with the NLRB,[61] and that in fact he made up his mind to quit during the weekend after the hearing prior to coming into work on May 11. Ellis admitted that he felt it would be uncomfortable working at Respondent, because of the testimony he had given at the hearing. In fact, Ellis had arranged for an interview with another Company, Metropolitan Packaging Co., herein called Metropolitan, for the morning of May 11, his first scheduled day back at the job after the hearing and, in fact, went to the interview on that day, before any of the alleged "onerous" conditions occurred.[62] He worked a half a day on May 11, a full day on the 12 and 13, 3 hours on May 14 and 4 hours on Friday, May 15, his last day at work for Respondent. On Monday, May 18, Ellis called in sick, and spent the next 2 weeks looking for another job. He did not notify Respondent of his quitting until May 29, when he came in to get his paycheck and informed Herbst that he was quitting because the atmosphere in the plant was "too tense." He did not elaborate on what he meant by "tense atmosphere," and made no mention of the alleged speedup in the machines, which he claims at the hearing motivated his decision to quit. Additionally, Ellis admits that he made no complaints to Hersko or Herbst about the alleged speedup of the machines during this week, wherein he worked about 3 full days. It is thus clear and I so find that Ellis quit his job not because of any alleged speedup in his machines, but because of his own uncomfortable feelings about his testimony, and because the atmosphere at the plant (i.e. Hersko did not joke with him as much and looked at him differently) was too "tense" for Ellis to be happy.

As for Powell, he admitted that he had made up his mind that he wanted to quit during the hearing, because of the way that management looked at the employees.[63] During the week of the hearing he began looking for a job, and he had made up his mind to quit during that weekend after the hearing ended, again before any onerous conditions were imposed. He interviewed at Metropolitan and was tried out on a machine there on May 13, 1981. He accepted a job on that day at Metropolitan, and was scheduled to start on Sunday May 17. At the time of the interview, Powell was promised by the owner of Metropolitan that he would be getting a lot of overtime work if he agreed to work there. On Sunday May 17, Powell reported to Metropolitan, but found the door locked, so he did not go in.

On Monday, May 18, he reported back to work at Olympia. On that day he received a call from Herman Katz, president of Metropolitan, who asked where Powell was on May 17. Powell explained that he was there, but the plant was closed. Katz asked if he could report on Wednesday, May 20, but Powell replied that he preferred to finish out the week at Olympia. They agreed that Powell would start at Metropolitan on Monday, May 25. At no time did Powell inform Olympia that he was intending to or in fact had quit.

On Friday, May 22, Powell testified that his machine suffered a breakdown, and that Thompson reported to him a conversation Thompson had with Hersko, wherein Hersko had complained that someone was sabotaging the machines. Powell testified that he believed that he was being accused by Hersko of the sabotage and this was the final event that made up his mind to leave Olympia. However, he still did not inform Olympia of his decision, but had his cousin allegedly call in sick for him. Powell worked at Metropolitan the week of May 25 through May 29. On May 29 Herbst called Powell at Metropolitan.[64] Herbst began the conversation by asking if Powell was working at Metropolitan and Powell replied that he was. Herbst asked what he should do with Powell's check, and Powell agreed to go to Respondent to pick it up. Powell then called Jean Pierre and asked her to send a telegram to Respondent informing it that he was feeling better and would be returning to work at Respondent on Monday, June 1. According to Powell, during the first week he worked at Metropolitan he was not receiving the overtime he had expected, so he decided that he wanted to return to work for Respondent.

Powell went to Respondent's premises and picked up his check. Neither during the phone conversation with Herbst or during the time that he was at Respondent's

[60] *Magnesium Casting Co.*, 250 NLRB 692 (1980).

[61] The first charge was filed on November 12, 1980. Ellis claimed that after this charge was filed, Hersko would look at him differently and not joke with him as he had done in the past.

[62] Ellis did not obtain a job offer from Metropolitan.

[63] Powell actually phrased it that he did not like the way management "hawked" at us.

[64] Herbst had been contacted by Katz at some unspecified time in May, and asked if he had any objections to Katz hiring Powell.

premises did Powell say anything to Herbst about reporting back to work. Although he sent a telegram stating that he intended to report to work on Monday, June 1, he did not do so. Powell explained that he did not show up on June 1 or any date thereafter, because he did not like the way Herbst sounded during their phone conversation.

Powell also testified that his quitting was caused in part by the "harassment" caused by the speeding up of his machines, but admitted that Hersko had frequently speeded up the machines before, as well as during and after the hearing.

Therefore it is clear that like Ellis, Powell's decision to quit was not motivated by any alleged speeding up of his machines by Respondent. Powell's own testimony reveals that also like Ellis, he was uncomfortable with the way he was being "looked at" by Respondent's officials, and he had made up his mind to quit prior to his returning to work after the hearing and prior to any alleged speeding up of his machine or any other "onerous" conditions imposed by Respondent. Moreover, Powell accepted a job at Metropolitan on May 13, only 2 days after returning to work after the close of the hearing, because he expected to receive substantial overtime from this employer. Finally, after working a week at Metropolitan and not obtaining the overtime he had anticipated, Powell sought to return to work at Respondent, where the conditions were allegedly so intolerable that he was forced to quit. He did not even report to Respondent on June 1 as stated in his telegram, because he did not like the sound of Herbst's voice on the phone. Thus, it is obvious, and I so find, that the alleged speeding up of their machines played no role in the decisions of either Powell or Ellis to quit their jobs at Respondent.[65]

Finally, I conclude that the General Counsel has not established that the alleged speeding up of the machines of Powell or Ellis were so intolerable or made it impossible for the employees to work under normal or reasonably normal conditions.[66] Thus, the record reveals that the result of any excessive speeding up of the machines would be that the machines would stop automatically or would jam. If the machines stop, the employee would merely catch up with the bags that he must remove, and would start the machine operating again. If there was a jam, Hersko would be called over and fix the machine. Neither of these eventualities in my judgment rise to the level of creating such intolerable conditions that would make it impossible for employees to work under normal conditions.

So in sum, in order for the General Counsel to prevail in a constructive discharge complaint, it is necessary for him to establish, by a preponderance of the evidence, all of the elements or requisites as set forth above; i.e., that Respondent discriminatorily created changed conditions of employment of its employees, that these conditions forced the employees to quit, and that these conditions were so intolerable that it made it impossible for them to work under normal conditions. The General Counsel has established none of these elements on this record. I shall therefore recommend dismissal of these allegations in the complaint.

The complaint, as amended, also alleged that Respondent issued a warning to Israel Arroyo because of his activities in support of Local 98 and his having testified at the original hearing, and attempted to condition his reemployment on Arroyo's withdrawing charges or recanting testimony previously given.

With respect to the first allegation pertaining to Arroyo, the record reveals that Arroyo testified at the hearing on Wednesday, May 6. At the end of the day at the Regional Office, Arroyo, Thompson, Powell, and Ellis were present. As they were leaving the courtroom, Herbst was asked if the employees should report to work the next day, May 7. Herbst replied that the next day would be a half a day, because Hersko was scheduled to be a witness at the Board on that day, and machines would not be fully operational absent Hersko's presence. Arroyo said nothing to Herbst, but told Thompson and Powell that he would not be in to work on the 7th, because it was not worth it for him to come in for a half a day.[67] On May 7 Arroyo did not report for work nor did he call to inform Respondent that he was not coming in.

He reported to work on Friday, May 8, as noted, to pick up his check, worked until 2 p.m. Nothing was said to him by Respondent about his not reporting on May 7.

The next working day was Monday May 11. He reported to work on that day, again with nothing mentioned to him about not coming in on May 7. On Tuesday, May 12, Arroyo claims that his sister became ill and he had to take her to the hospital. Arroyo called the shop at 8 a.m. and told Magnotta that he was not going to be in and the reasons therefor. Magnotta replied, "All right."

The next day May 13, Arroyo was called into Herbst's office about 10 a.m. Present, in addition to Herbst and Arroyo, was Herbst's secretary. Herbst asked Arroyo why he had not come in to work for the half day on May 7. Arroyo replied that it was not worth it for him to come in to work for half a day. Herbst then asked him about his absence on the 12th and he explained about his sister's illness. Herbst asked him for the name of his sister and the hospital she was in. Arroyo furnished this information, and Herbst instructed his secretary to write this information down which she did. Herbst then told Arroyo that he could not tolerate Arroyo's continued absenteeism any longer. He added that if Arroyo were sick he should be cured, but if he was healthy he should come to work. Herbst continued that, if he could not come in regularly, he should seek another job. Arroyo asked if he were fired? Herbst replied no, that this was just a warning that he should be in every day.

[65] See *Great Plains Beef Co.*, 241 NLRB 948 (1979).

[66] *John S. Barnes, supra; Magnesium Casting, supra.*

[67] Herbst did not define what he meant by a half a day's work. The employees regularly work a half day on Fridays, which is 8 a.m. to 2 p.m. When asked why he came in on Fridays, Arroyo answered to pick up his check. Arroyo further testified that he thought a half day meant 12 to 6 p.m. However, he could not explain why he believed this was what Herbst meant.

It is undisputed that Arroyo had the worst attendance record among Respondent's employees. It is also undisputed that Arroyo was spoken to about his absence problem by Hersko and/or Herbst on numerous occasions both before and after the appearance of Local 98 and the various ULP and representation hearings. I find that a number of these conversations occurred in Herbst's office, sometimes with his secretary present, and that either Herbst or Hersko regularly warned Arroyo that he must come in to work regularly, and if he did not he would be fired and/or would have to find himself another job.[68]

Herbst admitted that he was bothered by some of the testimony given by Arroyo at the hearing which Herbst felt was not truthful, particularly his testimony that Herbst stated that only Jews would be employed by Respondent.[69] Therefore, Herbst admitted that when he decided to issue a warning to Arroyo, he wanted the warning to be "well documented," and therefore made sure that his secretary was present as a witness to the conversation. Herbst felt that it was a "delicate situation" at the time, and wanted a witness to be present to document if necessary what Herbst said to Arroyo. Herbst denies that the decision to issue Arroyo a warning was influenced in any way by his prior testimony.

The record reveals that after this warning was issued to Arroyo, he continued to be absent on a number of occasions, and was not terminated by Respondent. Arroyo was absent on August 3, 4, 5, 6, and 7, and did not call Respondent to report his absence nor to give any reasons therefor. On August 10, Arroyo reported to work, informed Herbst that he was quitting, and picked up his check.[70]

After he quit, Arroyo attempted to sign up for unemployment insurance, and claimed that he was let go for lack of work. Herbst disputed the claim however, and advised Unemployment that Arroyo had quit. When Arroyo was notified of this action, he called the shop and spoke to Hersko. Arroyo said that Herbst would not sign for his unemployment, so he wanted to know if he could get his job back. Hersko replied that Arroyo knows that Herbst thinks he does a good job, but the problem is his attendance. Arroyo answered that he is ready and willing to come in every day. Hersko suggested that he speak to Herbst and tell this to him. Arroyo agreed to do so.

Arroyo then spoke to Herbst. He began by asking Herbst why he refused to sign for Arroyo's unemployment benefits. Herbst replied that he (Arroyo) is not entitled to unemployment because he had quit, and that he (Herbst) would not tell a lie to Unemployment that he was let go for lack of work. Arroyo asked if Herbst could help him out and said that he had no money. Herbst answered, "nobody asked you to quit." Arroyo then said that he was sorry and was out of work, and asked for his job back. Arroyo also promised that he would come on time and would show up every day. He reiterated that he was broke and needed the money badly. Herbst told Arroyo that he would think about it, and see if he "wanted to go through again those absentee problems."

A few days later Arroyo called Herbst again, and Herbst told him to come down to the shop and they would discuss the matter further. When Arroyo arrived at the plant he encountered Hersko. Arroyo began by telling Hersko that he needed his job back and that his wife and children needed to eat. Arroyo added that the Union had promised him so many things, including promising to get him a job if he were out of work, but there were 2,000 people unemployed there, and they (the Union) did not even want to talk to him because they had so many people. Arroyo continued that he was sorry he made charges against Olympia and was sorry he ever got into this mess.

Hersko replied that he felt sorry for Arroyo that he had to go through all this. Hersko added, "If I would have been you, I would have been smarter to begin with." Hersko also said to Arroyo that he felt if Arroyo promises to improve his attendance record, Herbst could be convinced to rehire him. Herbst then came over and called Arroyo into his office. Herbst told him that he sympathized with Arroyo's problems of sickness and his family, but he (Herbst) is running a business. Herbst added, "I can't afford to have a machine down every time you don't show up. It is a machine that costs money. It has to operate especially when there is work." Herbst then offered to take him back if he could assure Herbst that he would come in every day and do his work. Arroyo with tears in his eyes, promised to come in every day and work. Herbst told him to start work immediately which he then did.[71]

Based on the above facts, I find that the General Counsel has not established that Respondent has violated the Act as alleged, or in any other manner with respect to its actions concerning Arroyo As to the warning issued to Arroyo, the evidence revealed that Respondent had issued many similar warnings to him, threatening discharge if he did not improve his attendance record both

[68] This finding is based on the mutually corroborative and credible testimony of Herbst and Hersko. I found Arroyo to be a particularly confused, evasive, and unimpressive witness throughout the hearing, particularly the reopened portion, I therfore do not credit his testimony as to this phase of the litigation where it conflicts with the testimony of Respondent's witnesses. His testimony that he was never threatened with discharge prior to the hearing is therefore discredited. Arroyo did in fact admit being spoken to about his absence record on many occasions, but only recalls being told by Hersko that if he did not come in more often, "things ain't going right." Arroyo admitted that he interpreted these remarks to mean "that probably I would get fired or thrown out."

[69] As noted above, I have found that Herbst never made such a remark.

[70] Arroyo asserts that he thought that he would be fired because of his being out so many days so he decided to quit instead.

[71] The above recitation of facts with respect to the events concerning the rehire of Arroyo is derived primarily from the credited and consistent testimony of Herbst and Hersko. I do not credit Arroyo's confused, uncertain, and inconsistent testimony to the effect that Hersko requested that he drop the charges that he had against Respondent in order to get his job back. I rely upon, in addition to my overall assessment of Arroyo's testimony in this phase of the proceeding as set forth above, the fact that Arroyo gave a number of versions of the alleged offending conversion with Hersko, on direct, cross, recross and redirect, each differing in substantially crucial areas, such as whether Hersko used the word charges, and what instructions, if any, Hersko gave him. I note additionally that Arroyo was not the charging party in any of the cases herein, so that there was nothing for him to have withdrawn, and no logical reason for Respondent to have suggested that he do so.

prior to and after the appearance of Local 98. Moreover, some of these warnings, also occurred in Herbst's office and in the presence of his secretary. Although the timing of the warnings is somewhat suspicious, since it occurred a week after Arroyo testified, this timing is outweighed and adequately explained by the circumstances. Thus, Arroyo failed to appear at work on May 7, the day after the hearing, and failed to notify Respondent of this fact, finally offering the rather lame excuse that it was not worth it for him to come in for a half day, while regularly reporting to work on Fridays, also a half a day. Additionally, he was again absent on May 12, the day before the warning was issued. I therefore find that the decision to issue Arroyo a warning for his continued poor absence record was not motivated in any way by his activities on behalf of Local 98 nor his testimony at the hearing.

It is true, as the General Counsel points out, that Herbst admitted that he was bothered by Arroyo's untruthful testimony at the hearing, but I am persuaded that Herbst was testifying candidly when he stated that this had no effect on the decision to issue him a warning, but rather that in view of Arroyo's tendency to attribute comments to Herbst that he did not make, Herbst wanted his secretary to be present as a potential witness to refute any inaccurate or fabricated allegations Arroyo might make.[72] I find nothing unlawful or coercive in Herbst's action in making sure his secretary was present as a potential witness. I note that his secretary had been present at some prior warnings given to Arroyo, so Herbst's action cannot be construed as a discriminatory change in the manner in which he gave the warning. I find that Respondent acted reasonably and prudently in seeking to have a witness present, because of the "delicate situation" present at the time,[73] and has not violated the Act either with respect to the issuance of the warning itself nor the manner or circumstances in which the warning was given.

I would also observe that in my judgment Respondent, rather than discriminating against Arroyo for his testimony or his union activities, may have bent over backwards to retain him for these reasons. The only action taken against him was a warning, which he had been issued many times before, and Respondent did not terminate Arroyo even when he was out for 5 days in a row in August and failed to even call. Yet, Arroyo quit at that time and then, after unsuccessfully attempting to collect unemployment insurance, begged Respondent for his job back and Herbst surprisingly agreed, although under no obligation to do so. These are not the actions of an employer who is intent on discriminating against an employee because of his union activities or his testimony.

Accordingly, I shall recommend dismissal of this allegation of the complaint.

With respect to the allegation in the complaint, as amended, that Respondent attempted to condition the employment of Arroyo upon his withdrawing Board charges or recanting testimony, as noted I have discredited Arroyo's testimony to this effect. Rather, I have found that the only mention of charges was made by Arroyo himself, while complaining about his decision to become involved with the Union, indicating that he was sorry about the charges, in an obvious attempt to curry favor with Respondent in order to persuade Respondent to take him back to work. Thus, the record does not support a finding that Respondent violated the Act as alleged by the General Counsel.

The record does indicate, however, that Hersko in discussing Arroyo's union activity made the comment, "if I would have been you, I would have been smarter to begin with." While in some circumstances this kind of a remark might be construed as unlawful, I do not believe that the instant situation warrants such a finding. Hersko was merely responding to an agreening with Arroyo's own statement of his disenchantment with his decision to become involved with the Union (Local 98), and his reasons for such dissatisfaction. It does not seem reasonable to conclude that Hersko's comments, in these circumstances, can be construed as an implied threat or promise, or an otherwise coercive statement.

Based on the foregoing, I shall therefore recommend dismissal of the allegation in the complaint, as amended, pertaining to the alleged attempt to condition employment of Arroyo, as well as recommending that the complaint in Case 29-CA-8949 be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent Olympia Plastics Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Rubberized Novelty & Plastic Fabric Workers' Union, Local 98, International Ladies' Garment Workers' Union, AFL-CIO, and Amalgamated Union Local 5, are each labor organizations within the meaning of Section 2(5) of the Act.

3. By laying off and refusing to recall or reinstate Gifford Sterling because of his activities on behalf of and support for Local 98, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By changing the lunchbreak procedures and reducing the hours of work, and overtime for its employees, because they engaged in activities on behalf of and supported Local 98, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By interrogating employees concerning their union activities and their intentions to vote in an NLRB election, by threatening employees with discharge and loss of the possibility of a bonus because of their support for Local 98, and by unlawfully promulgating and applying a discriminatory and overly broad no-solicitation rule restricted to discussions about unions which can reasonably be construed as applying to employees when they are on off-duty time, Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[72] I would note that I did not credit Arroyo with respect to his testimony which particularly bother Herbst; i.e., that he (Herbst) had said Respondent would only hire Jews.

[73] It appears that Herbst's fears were well justified, in view of the fact that a complaint had been issued with respect to Respondent's conduct involving Arroyo.

6. By informing its employees that it preferred that they support and vote for Local 5 rather than Local 98 in the pending election, while promising these employees wage increases, bonuses, and other benefits and improvements in their conditions of employment, and informing them that they would obtain the same or better benefits if they selected Local 5 as they would if they supported Local 98, thereby informing employees that it would be futile for them to select Local 98 as their collective-bargaining representative, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, as well as contributing unlawful assistance to Local 5 in violation of Section 8(a)(2) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not otherwise violated the National Labor Relations Act.

9. Samuel Hersko is a supervisor and agent of Respondent within the meaning of Section 2(11) of the Act, and the challenge to his ballot is sustained and shall remain unopened and uncounted. Accordingly, a certification of representatives should be issued to Local 98 as the collective-bargaining representative of Respondent's employees.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent laid off or terminated Gifford Sterling in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer Sterling immediate and full reinstatement to his former position of employment or, if that position is not available, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

Having also found that Respondent has violated Section 8(a)(1) and (3) of the Act by changing its lunchbreak procedures and working hours, and reducing overtime for its employees, I deem it appropriate to order Respondent to restore its prior practice of working hours for the bagmaking department of 8 a.m. to 6 p.m., Monday to Thursday, and 8 a.m. to 2 p.m. on Fridays, and to permit employees to eat their lunch while continuing to work, thereby receiving pay for their lunchbreak.

I shall also recommend that Respondent be ordered to make whole Sterling and the employees in the bagmaking department,[74] for any losses they may have suffered by reason of the discrimination against them. The loss of earnings for Sterling and the other discriminatees shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also order expunction from Respondent's files of any reference to the layoff or termination of Sterling. *Sterling Sugars*, 261 NLRB 472 (1982).

I also deem it appropriate to order Respondent to rescind and abrogate its rule prohibiting employees from discussing unions among themselves, and notify its employees that it has taken such action and that they may henceforth engage in such discussions on its premises subject to limitations permissible under the Act. See *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1225 (1976).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[75]

The Respondent, Olympia Plastics Corp., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their membership in or support for Rubberized Novelty & Plastic Fabric Workers' Union, Local 98, International Ladies' Garment Workers' Union, AFL-CIO, herein called Local 98, or concerning their intentions in voting in a National Labor Relations Board election.

(b) Threatening its employees with discharge, loss of the possibility of a bonus, or other reprisals, because of their support for Local 98.

(c) Instructing its employees not to talk about Local 98 or unions in the absence of a valid no-solicitation rule.

(d) Enforcing or maintaining a no-solicitation rule which can reasonably be construed as applying to employees when they are on off-duty time.

(e) Informing its employees that it preferred that they support and vote for Amalgamated Local 5, herein called Local 5, rather than Local 98 in a National Labor Relations Board election.

(f) Promising its employees wage increases, bonuses, and other benefits and improvements in their conditions of employment, to induce them to support and vote for Local 5 in a National Labor Relations Board election, or to abandon their support for and activities on behalf of Local 98.

(g) Informing its employees that they would obtain the same or better benefits if they selected Local 5, as they would if they supported Local 98, or otherwise informing its employees that it would be futile for them to

[74] Although the complaint alleges certain specific employees in the bagmaking department, i.e., the Local 98 supporters, Arroyo, Thompson, Powell, and Ellis, as having been discriminated against in this regard, it is obvious that the changes in hours and to some extent the reduction in overtime, were applied to all employees in the department, such as Weiler and even later on to the new hire, Azarev. However, since the complaint does not allege Weiler or Azarev as discriminatees, I find that Respondent was not appraised that its conduct with respect to them was in issue, and foreclosed it from perhaps offering some defense peculiar to these individuals. Thus, I find that it is inappropriate to order any backpay for these individuals, since their status was not fully litigated.

[75] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

select Local 98 as their collective-bargaining representative.

(h) Laying off or terminating its employees because of their activities on behalf of or support for Local 98.

(i) Changing its lunchbreak procedures, and reducing the hours of work and overtime of its employees, because of their activities on behalf of or support for Local 98.

(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Gifford Sterling immediate and full reinstatement to his former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed.

(b) Restore its prior schedule of working hours for the employees in the bagmaking department, of 8 a.m. to 6 p.m., Monday to Thursday, and 8 a.m. to 2 or 3 p.m. on Fridays, while permitting said employees to eat their lunch while continuing to work, thereby receiving pay for their lunchbreak.

(c) Make whole employees Gifford Sterling, Michael Thompson, Daniel Ellis, Israel Arroyo, and Edwin Powell for any losses of pay each may have suffered by reason of the discrimination against them in the manner set forth above in the section entitled "The Remedy."

(d) Expunge from its files any reference to the layoff or termination of Gifford Sterling on November 7, 1980, and notify him in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for future personnel actions against him.

(e) Rescind and abrogate its rule prohibiting employees from discussing unions among themselves, and notify its employees that it has taken such action and that they may henceforth engage in such discussions on its premises subject to limitations permissible under the Act.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its place of business in Brooklyn, New York, copies of the attached notice marked "Appendix."[76] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaints, as amended, be dismissed in all other respects.

IT IS FURTHER ORDERED that in Case 29–RC–5205, the challenge to the ballot of Isaac Hersko be sustained, and that a certification of representatives be issued to Local 98 as the collective-bargaining representative of Respondent's employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their membership in or support for Rubberized Novelty & Plastic Fabric Workers' Union, Local 98, International Ladies' Garment Workers' Union, AFL-CIO, herein called Local 98, or concerning their intentions in voting in a National Labor Relations Board election.

WE WILL NOT threaten our employees with discharge, loss of the possibility of a bonus, or other reprisals, because of their support for Local 98.

WE WILL NOT instruct our employees not to talk about Local 98 or unions in the absence of a valid no-solicitation rule.

WE WILL NOT enforce or maintain a no-solicitation rule which can reasonably be construed as applying to employees when they are on off-duty time.

WE WILL NOT inform our employees that we prefer that they support and vote for Amalgamated Local 5, herein called Local 5, rather than Local 98 in a National Labor Relations Board election.

WE WILL NOT promise our employees wage increases, bonuses, and other benefits and improvements in their conditions of employment, to induce them to support and vote for Local 5 in a National Labor Relations Board election or to abandon their support for the activities on behalf of Local 98.

WE WILL NOT inform our employees that they would obtain the same or better benefits if they selected Local 5 as they would if they supported Local 98, or otherwise inform our employees that it would be futile for them to select Local 98 as their collective-bargaining representative.

WE WILL NOT lay off or terminate any of our employees because of their activities on behalf of or support for Local 98.

WE WILL NOT change our lunch break procedures, and/or reduce the hours of work and over-

[76] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

time of our employees, because of their activities on behalf of or support for Local 98.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer Gifford Sterling immediate and full reinstatement to his former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed.

WE WILL restore our prior schedule of working hours for the employees in the bagmaking department, of 8 a.m. to 6 p.m., Monday to Thursday, and 8 a.m. to 2 or 3 p.m. on Fridays, while permitting said employees to eat their lunch while continuing to work, thereby receiving pay for their lunch break.

WE WILL make whole employees Gifford Sterling, Michael Thompson, Daniel Ellis, Israel Arroyo, and Edwin Powell for any losses of pay each may have suffered by reason of the discrimination against them, plus interest.

WE WILL expunge from our files any reference to the layoff or termination of Gifford Sterling, on November 7, 1980, and notify him in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for any future personnel action against him.

WE WILL rescind and abrogate our rule prohibiting employees from discussing unions among themselves, and notify our employees that we have taken such action and that they may henceforth engage in such discussions on our premises subject to limitations permissible under the Act.

OLYMPIA PLASTICS CORP.